Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy

November 2015 Working Draft. Please do not cite or quote without author's permission. Not yet cite checked, some citations missing. Forthcoming in William and Mary Law Review.

Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy

Vicki C. Jackson[1]

The role of the judge in a constitutional democracy has occupied the time and attention of lawyers, judges and law students for decades -- the concept of a representative, much less so. Legal scholarship has constructed judging as both the problematic, in constitutional cases, and as the desideratum of lawmaking, in the case method and in the heroic conception of Herculean judges. Perhaps the leading concept in American constitutional theory in the last 65 years - the countermajoritarian difficulty - assumes it is the rule of the judge that requires an account. And accounts have been given -- of great variety of great normative thickness, and contestedness -- and offered not only in constitution law courses but across a very wide spectrum of courses as the work of judges is evaluated.

But the role of elected representatives has garnered far less scholarly and pedagogical attention in contemporary legal education.[2] In part this may be because it appears normatively unproblematic; in a constitutional democracy by definition representatives have authority to act. But in a time of declining respect for legislatures

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[1] This paper, which formed the basis for the Cutler Lecture given at William & Mary Law School, March __, 2015, was originally prepared for Princeton Con Law Schmooze, on "Democracy and Accountability," December 7, 2012. With thanks for helpful comments from or conversations with Lori Andrews, Bernadette Atahueni, Felice Batlan,William Birdthistle, Jamal Greene, Jonathan Gould, Tara Grove, Gabor Halmai, [Sarah Harding?], Steven Jackson, Tsvi Kahana, Harold Krent, David Law, Clark Lombardi, David Fontana, Tara Grove, Edward Lee, Jayne Mansbridge, Martha Minow, David Pozen, Intisar Rabb., Todd Rakoff, Judith Resnik, Michael Seidman, Jamal Greene, Mark Rosen, Cesar Rosado, Michael Sandel, Fred Schauer, Kim Scheppele, Chris Schmitt, Nicholas Stephanopoulos, Joan Steinman, Mark Tushnet, Mila Versteeg, Robin West; other participants in workshops at Harvard Law School, William and Mary Law School, Chicago Kent Law School, and the George Washington University Law School Comparative Constitutional Law Roundtable, and many others, none of whom bear any responsibility for errors of thought or accuracy or otherwise in this draft, which is my first effort to put something on paper about the subject. I was aided by a number of talented law students, including Aaron Frumkin, Lauren Davis, Jason Schaffer, Ariel Giumarelli and Noah Marks.

[2] William and Mary Law School, founded by George Wythe, in its early years ran both a "moot court" and a "moot legislature" program, as Wythe apparently conceived of the school as training lawyers, judges and representative lawmakers. See Paul Heller, America's Legal History Started at Williamsburg, 2014 Library Staff Publications http://scholarship.law.wm.edu/libpubs/107; Paul D. Carrington, *The Revolutionary Idea of University Legal education*, 31 Wm & Mary L. Rev. 527, 534-36 (1990). Its role in preparing future legislators was favorably noted by Thomas Jefferson. *See id.* at 536 (quoting Jefferson, in 1780, as saying "This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.").

and widespread perception of a decline in Congress' ability to function as a lawmaker, [3] those concerned with the basic functioning of American constitutional democracy can no longer afford to simply assume the unproblematical character of the legislator's role.

Judging and representing are two foundations of U.S. (indeed of any modern) constitutional democracy. Yet legal education neglects the subject of representation, which is a normatively more complex and demanding position in the U.S. federal system than is being a judge; in law schools it is, however, presented in narrow and normatively flat ways. I discuss this in Part I. In recent years, some attention has been given to the role of representatives in interpreting constitutional law.[4] But this growing literature has not taken on the larger task of offering a more general account of the normative expectations of elected representatives in a constitutional democracy. This paper aims to promote thinking and research in this area. Its claims are these: that the subject of representing subject is very neglected, in comparison to the enormous literature on the role of judging; that it is worth the effort to try to define the aspirations and responsibilities of a "conscientious" or "pro-constitutional" legislator in the U.S. constitutional democracy; and that the effort is worthy of consideration in law schools with possibly interesting payoffs in several areas.

It is possible to develop and to teach a more complex normative account of representation, an account I would call the idea of a "pro-constitutional representative." Part II explains this concept, grounding it in the nature of an elected representative, the nature of a legislator, and the specific contours of the U.S. Constitution; it then tries to define the aspirations and responsibilities of a "conscientious" or "pro-constitutional" legislator, especially in the national Congress. A pro-constitutional representative is not concerned only with interpreting specific provisions of the constitution, nor with assuring that legislation she promotes would meet constitutional standards. Rather a pro-constitutional representative is one who more broadly to fulfill the complex and at times conflicting demands of "representing", in many ways a more demanding task than that of "interpreting" a legal instrument. Representing requires not only presence but "acting," not only responding but initiating. Part II identifies some components of what such a more complex normative account would address; although these criteria may not be capable of definitive application in any specific instances, they provide useful parameters for evaluating representatives' conduct as a whole. The include elements on which there is probably widespread agreement -- such as providing information to, and receiving information from, constituents; and other elements, including a willingness to compromise, that I expect to be more controversial.

Finally, in Part III, I return to why the subject is fit for law schools and worth the effort to better integrate attention to the normative qualities of good representatives, and

[3] See Gallup, Confidence in Institutions (2015), http://www.gallup.com/poll/1597/confidence-institutions.aspx (reflecting that the public has the least confidence, of any institution surveyed about, in the Congress -- below the military, the Presidency, the Supreme Court; below small businesses, the police, churches, public schools, banks, organized labor; even below "big business.").

[4] The seminal article may well be Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975).

good representative bodies. On scholarship, thinking harder about what makes a good representative in a constitutional democracy sheds interesting light on comparative forms of representation; it may likewise shed light on interpretive theories based on deference to legislatures or 'representation-reinforcement.' On teaching, it may better prepare those law students who go on to be representatives to think complexly about their roles. And it may help raise the level of expectations of representatives in ways that would serve the public good.

I. The Relative Neglect of the Normative Significance of Being a Representative in a Democracy.

What happens when the Court decides a controversial issue? In District of Columbia v. Heller,[5] for example, the Court, by a 5-4 vote, overruled an earlier decision and held that the Second Amendment guaranteed an individual right to possess weapons, especially in the context of weapons in the home suitable for self -defense. There was public commentary and scholarship analyzing the opinions and their implications, the reasoning methods, the interpretive sources, and the consistency with which they were applied.

What happens when the Congress has a controversial issue before it - - a recent instance involve the question of raising the debt ceiling to avoid default or harm to the U.S.' credit in 2011.[6] Are there news articles analyzing the reasons for different Senators or Congressmen's positions? Typically not. Is there scholarly commentary on what different members of the legislature should do? In that crisis, the dominant concern of legal scholarship for at least several months was whether the President could act on his own if Congress did not.[7] Very little scholarship focused on the reasons for and conduct of the elected members of the Congress.

There are many reasons for this lopsided analytical focus. For one thing, even when legislation is subject to constitutional challenge it is typically an executive branch officer who is the named party respondent; actions by the President or other executive officials is often subject to judicial review; *inaction* by the legislature is not.[8]

The Supreme Court, moreover, is the head of a large judicial system in which principles of judicial hierarchy and stare decisis mean that what the Supreme Court says will have impacts on the decisions of many lower courts, state and federal. Legislation is

[5] District of Columbia v. Heller, 554 U.S. 570 (2008)

[6] For description of this crisis, see, e.g., Neil H. Buchanan & Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff, 112 Colum. L. Rev. 1175 (2012); Neil Buchanan and Michael Dorf, Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option, Columbia Law Review (Sidebar) (December 2012).

[7] See, e.g., Dorf & Buchanan (2012), supra note __.

[8] In some other constitutional systems actions for unconstitutional legislative omissions are recognized. See VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 831 (3d ed 2014) (noting Portugal's constitutional provision recognizing the court's power to control "unconstitutionality by omission" in failures of legislatures to act).

different. Congress' relationships with the state legislature is not as directly hierarchical. And stare decisis as such does not exist for legislatures. But still, a federal law has powerful preemptive force, controlling the actions of many officials and frequently of other persons as well.

Another possible reason for the lopsided focus: there are many fewer judges on the Supreme Court than there are members of Congress. Although there are about 1,000 Article III judges altogether, there are only nine members of the Supreme Court - as compared to 435 members of the House and 100 in the Senate. In any given cases there is ordinarily no more than 2 to 5 judges on an appellate panel. Even where a court of appeals sits "en banc," it sits with far fewer than the number of legislators.[9]

A third reason for the difference in focus is that we are more sure we care about reason-giving in courts than about reason-giving in legislatures. It is considered an obligation of appellate courts to give reasons explaining judgments; indeed, the obligation to give reasons is often considered a fundamental "check" on the power of the courts.[10] But as far as legislatures go, judges and jurists disagree about the need for and significance of reasons; they also disagree, for example about the role of so-called "legislative history, " in which arguments are often made about the reason for legislation and about legislators understandings of what the legislation is designed to accomplish.

A fourth difference -- and this is the one I want to focus on -- is that law schools and legal scholars have constructed judging as a focus of normative attention in a way that has not happened for representatives. As noted above, in legal scholarship and law school teaching the role of the judge, of what is good judging, of legitimate approaches to interpretation, are studied frequently and from multiple perspectives.[11] Judicial independence, its structures and meaning, are also the subject of study in multiple courses. But legal education produces much richer understandings of normative demands and competing theories about what being a good judge means than about what being a good elected representative means. Law schools and legal scholarship are filled to overflowing with normative accounts of judging. Whether in the development of the common law, the interpretation of statutes, the decision of constitutional questions involving local or national laws, there are normatively thick, and nuanced, and competing and contested accounts of what “good” judging entails. There is substantial agreement on some core attributes of judging – a set of “shalt nots” involving corrupt behavior or the allowance of certain forms of bias to intrude on judicial decisions. But there are also a

[9] See, e.g., Local Rules, Ninth Circuit Court of Appeals, Rule 22.4(d) (providing for en banc review by 11 judges, instead of the full 29 in the Ninth Circuit). By statute, the next largest court of appeals is the Fifth Circuit, with 17 judges, 28 U.S.C. 44; see also Fifth circuit Local Rule of Appellate Procedure 35.6 For the general rule on who can participate in en banc review, limiting it to the members in active service plus any senior judge who sat on the panel decision under review, see 28 U.S.C. 46 (c).

[10] See, e.g., Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 , 747 (1987) (agreeing "with Lon Fuller that reasoned response to reasoned argument is an essential aspect of [the judicial] process"); *see also* Jerry L. Mashaw, *Small Things Like Reasons Are Put in A Jar: Reason and Legitimacy in the Administrative State,* 70 Fordham L. Rev. 18 (2001)

[11] See supra text at __.

number of "thou shalts" for being a good judge -- about the idea of impartiality (which mirrors, in a positive way, the prohibition of bias) and about accuracy and competence in understanding and applying the law, where there is clear law that controls decision.

There is much normative contest over other aspects of judging - - in interpreting statutes, for example, should the judge conceive herself to be the "faithful agent" of the legislatively enacted text?[12] of the underlying legislative intent or overarching legislative purpose?[13] should the judge see herself as a "junior partner" of the legislature, sensibly trying to fill in and make more coherent or normatively attractive a legislative scheme with its inevitable lacunae, potential inconsistencies and the like?[14] Should approaches to statutory interpretation carry over to constitutional interpretation? What is the impact of the difficulty of amendment for constitutional interpretation?[15] Can the text evolve over time as understandings change? Is there a stronger or weaker role for stare decisis in federal statutory, common law or constitutional cases? Is there a "countermajoritarian" difficulty to invoking judicial review in a democracy; if so, what are normatively appropriate responses to that difficulty? original understandings or intent? the "Thayer" rule?[16] John Hart Ely's approach?[17] an evolving meaning approach based on widespread understandings? a moral approach based on application of deep principles embodied by the constitution?[18] These kinds of questions are posed to our students, again and again, in a variety of classes.

Other aspects of the normative role of judging may vary depending not on the subject matter but on the judge's position in the court system: For trial courts, for example, what is the best normative balance between allowing lawyers to control the litigation and having the judge herself shape the litigation? This is highly contested, as are the benefits of "managerial" judging towards informal settlement as compared to public trials and more formal adjudication.[19] On multimember courts, other normative debates exist about the role of principle and compromise. Most agree that overt log-rolling is inconsistent with a judge's job to be a "principled" decisionmaker. But should every disagreement result in a different opinion?[20] Should "undertheorized" decisions that may lack analytical clarity but find agreement be favored over more analytically

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[12] See generally John Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).
[13] See generally William N. Eskridge Jr., and Philip P. Frickey, *The Making of the Legal Process*, 107 Harv. L. Rev. 2013, 2037-xxxx (1994).
[14] See Daniel J. Meltzer. *The Supreme Court's Judicial Passivity*, 2002 Sup Ct Rev. 343.
[15] See Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's The Will of the People*, 13 U. PA. J. Const. L. 413, 434-46 (2010).
[16] See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781 (2003).
[17] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing for representation reinforcement as basis for judicial intervention)
[18] See, e.g, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).
[19] For description of the trend towards judges as managers of lawsuits and promoters of settlement, and critique of the abandonment of adjudication, see Judith Resnik, *Managerial Judges,* 96 Harv. L. Rev. 374 (1982); Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming The Meaning Of Article III*, 113 Harv. L. Rev. 924 (2000)
[20] For one view, see, e.g., Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 Wash. L. Rev. 133 (1990).

clear, or comprehensive treatments that results in more splintered courts?[21] These questions are also ones that recur across the law school curriculum.

The work of democracy is typically done through processes that must be authorized by elected representatives. The size and scale of modern states make this a necessity; without representation, inclusion of multiple viewpoints in governance would be close to impossible. Indeed, some political scientists now view representative democracy as a "first-best", not "second-best" form of democratic governance.[22] But in law schools, to the extent that we talk about the work of representatives in our classes on constitutional law, we tend to speak of the legislative body as a whole, with generalizations about what motivates the body to act; we do not, usually, focus on the role of a single representative himself, or herself. And, with respect to legislator/legislature motivation, we tend to offer thin – and normatively unattractive or naive – accounts.

With respect to judging and courts, law school classrooms are populated across subject areas with highly elaborated and nuanced normative aspirations for the role of constitutional judging, that may well be coupled with a skepticism about whether law, or principle "really matter" to judicial decisions. In contrast to these richly elaborated normative theories about what good judges do and should do, the approach – in too many classrooms, and too much writing (my own included, I am sure) about legislatures and elected representatives -- has been to veer from a highly formal "black box" of the "representative democratic process" under which it is simply presumed that legislation carries with it a democratic imprimatur of legitimacy (what Jane Schacter calls the "accountability axiom"),[23] to a corrosive form of (pseudo?) realism, in which legislators are motivated, cynically, only by the desire to be re-elected and enjoy the accouterments of office,[24] and statutes are regarded as the unfortunately "sausage-like" product of a cynical and unprincipled legislative process driven by concern for narrow (and campaign-

[21] See Cass Sunstein, *Foreword: Leaving Things Undecided,* 110 Harv. L. Rev. 4 (1996)

[22] See, e.g., NADIA URBINATI, REPRESENTATIVE DEMOCRACY 223-28 (2006).

[23] Richard Hasen, *Lobbying, Rent-Seeking and the Constitution*, 64 Stan. L. Rev. 191, 216 (2012) (describing "black box" of deliberative democracy in legislatures); Jane S. Schacter, *Political Accountability, Proxy Accountability and the Democratic Legitimacy of Legislatures*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 45, 45 ("accountability axiom"). Schacter's work problematizes assumptions about the accountability resulting from democratic elections, both because of "deficits in accountability" arising from voters lack of knowledge and asymmetry in accountability because of disparities in the political process. Id. at 46; see also Jane Schacter*, Ely and the Idea of Democracy*, 57 Stan. L. Rev. 737 (2004).

[24] See Samuel Issacharoff and Richard Pildes, *Politics as Markets: Partisan Lock Ups of the Democratic Process*, 50 Stan L. Rev. 643, 649-50 (1998) ("[P]ublic choice theory defines the legislative process as an arena for fundamentally self-serving behavior as legislators trade off votes on specific legislation to advance their prospects for reelection."); see also id, 708-09. For a similar but less critical description of social choice theory in law, see e.g., Jonathan R. Macey, Public Choice and the Legal Academy, 86 Geo. L. J. 1075 (1998) (reviewing Jerry L. Mashaw, Greed, Chaos and Governance (1997)). The reductionism of such theories has been subject to critique. See, e.g., Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121 (1990); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical' Practice of the Public Choice Movement*, 74 Va. L. Rev. 199, 217-68 (1988).

contributing) interest groups.[25] Such attitudes may be expressed both about hard-fought legislative compromises that pass by the slimmest of majorities and about legislation that is passed by substantial majorities; or about legislation rushed through a Congress with little deliberation or legislation that culminates a multi-year process of legislative factfinding.

In addition to the "legitimate democratic will" version of legislation, and the public choice "rational actor" model of the representative who seeks to maximize only his or her own reelection (or other self-interested gain), there is on occasion in law school classrooms a recognition of the various collective choice problems of legislative decisionmaking, which can explain how, even with legislators acting in good faith, legislation may be enacted that does not represent the views or preferences of a majority.[26] (Such moves may be invoked, for example, to help to explain why courts invalidating of laws may not be 'countermajoritarian,' or to problematize the concept of a "legislative intent" or "purpose" that can guide statutory interpretation.) But these are positive propositions; they do not contribute in any direct way to a normative account of what a good representative in a constitutional democracy **should** do, in light of such collective action (and other) problems.

The 2012 Foreword to the Harvard Law Review, written by Pam Karlan, develops the theme that the current majority of the Court shows "contempt" for the democratic branches.[27] Disdain for or distrust of the most representative branch is pervasive.[28] When we assume in our teaching that members of the legislature are motivated only by a desire for re-election, do we implicitly convey a degree of normative disdain? One might think that the motivation to be reelected is an essential constitutional mechanism of democratic accountability. Why, then, should such motivations be viewed only as a negative fact about representatives?[29]

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[25] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 61-63 (2007) (discussing "rent extraction" as legislative activity but arguing that "it accepts the inaccurate view of legislators as one-dimensional seekers of financial rewards from special interest groups . . . although reelection and interest group considerations are important to lawmakers, most are also pursuing other objectives, such as affecting policy in ways consistent with their ideological commitments"). The challenges of aggregating group preferences, as explored by public choice theorists, may also limit the fairness and coherence attainable even by sincerely motivated collective decision-makers.

[26] See, e.g., Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 Harv L Rev 4, 11-12 (2009) (explaining Arrow's theorem)

[27] Pamela Karlan, *Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, xx (2012).

[28] See supra note [Gallup poll]The phenomenon of publics having greater trust in their constitutional courts than in their legislatures is not limited to the United States. See David Law, *Theory of Judicial Power and Judicial Review,* 97 Geo. L. J. 723, XXX (2009).

[29] Gerrymandering, the impact of money on elections, and the need for tremendous amounts fundraising all help account for some of the negative views of federal legislators. I do not disagree with those who view the current financing system and its reliance on large donors as corrosive (for varying accounts, see, e,g, LAWRENCE LESSIG, REPUBLIC, LOST (year)]; Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009); Samuel Issachoroff, *On Political Corruption*, 124 Harv L Rev 118 (2010); see also Hasen, *Lobbying, Rent-Seeking and the Constitution*, supra note__ at 221-22 (noting lobbyists' raising campaign contributions as way to gain aces to legislators and noting risks of lobbying producing "rent-seeking" legislation), nor that the drawing of district lines could better be performed by nonpartisan actors, nor that without political competition within electoral districts it is difficult to achieve appropriate levels of

Constitutional Law casebooks almost always include *Marbury v Madison*, framed, at least in part, by a discussion of what it is the "judiciary" and its judges necessarily do and ought to be doing. Many Con Law books return, repeatedly, to questions of interpretation (which are presumptively about "good" judging as well). But how many Con Law casebooks introduce students to debates between Burkean (or "republican") views of the representative as a "trustee", obligated to exercise independent judgment in voting (considering constituents' views but not treating them as dispositive), and more pluralist, interest-group accounts in which a good representative ought to act more as the "delegate" and advance primarily the interests or views of her constituency? Even in the Brest-Levinson casebook, known for its innovative approach in including non-judicial materials of constitutional interpretation, there is little effort to explore the ways in which *being a representative matter* to the nature of the constitutional interpretation that is offered.[30] And there is little attention paid in constitutional law

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accountability, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002). Nor do I disagree that representation may reflect racism, and other forms of injustice, in ways that warrant attention to the inclusiveness of legislatures vis -a-vis disadvantaged social groups. See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 121-153 (2000); Melissa Williams, *The Uneasy Alliance of Group Representation and Deliberative Democracy*, in CITIZENSHIP IN DIVERSE SOCIETIES 131-144 (Will Kymlicka and Wayne Norman eds. 2000); *cf. e.g.,* John E. Romer, *Why does the Republican Party Win Half the Votes?*, in POLITICAL REPRESENTATION 316-21 (Ian Shapiro et al eds. 2009))(exploring inter alia "-race-based" and "anti-solidarity" effects). Rather, I seek here to argue the benefits of articulating a normatively complex account of the role of legislators that recognizes that they are not supposed to behave like judges, that their obligations under the Constitution are different; and that the "representative" character includes a normatively attractive element of responsiveness to electoral constituencies.

[30] Thus, the Brest Levinson casebook as of its Fifth Edition, BREST, ET AL, PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS (5th ed 2006), includes legislative forms of constitutional interpretation (e.g. id at 88-93, nullification expressed in state legislatures; 28-32, views of Rep. James Madison in Congress on the national bank), forms of interpretation offered by Presidents (e.g., 64-65, Jefferson on acquiring Louisiana, 71-79, Andrew Jackson on the national bank) and (261-69, Lincoln as President on secession vs Judah Benjamin, as he left the Senate), Cabinet members (e.g, the Attorney General, and the Secretary of the Treasury, on the National Bank, at 332-33, 34-37), presidential candidates (e.g., 257-60, Lincoln-Douglas debates), members of the Cabinet (e.g., by social movements (e.g., 166-68, Seneca Falls declaration) and by influential individuals (e.g., Frederick Douglass, 253-57), in addition to cases decided by courts. But this wonderful book does not include material reflecting on the nature of being a representative, in some contrast with material understandably devoted to the role of *courts* in constitutional review – including but not limited to *Marbury*. *See id*. at 108-23.

Casebooks on legislation are another place where attention to the role of legislators might be expected. Yet even here, there appears to be relatively little attention to the normative obligations of legislators. The Hart & Sacks, Legal Process material devotes attention to the functions carried out in legislatures (e.g., legislating, oversight, constituent service), but not to the normative obligations of legislators as such. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (1994). The Eskridge-Frickey casebook discussed legislators' obligations to assure themselves of the constitutionality of legislation, under precedents established by courts. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 428-35 (2007). The Manning-Stephenson casebook considers whether legislators are aware of judicial canons of interpretation. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 280-81 (2013) William Popkin's book on legislation consider electoral incentives of legislators, e.g., whether voters are more likely to blame than give credit, and the incentives for risk-averse behavior this creates. WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 146-50 (2009). See also FRANK C. NEWMAN & STANLEY S. SURREY, LEGISLATION CASES AND MATERIALS (1955). Of the casebooks on legislation reviewed, some

books or teaching to the positive duties that legislators may have -- to act, positively, to give effect to constitutional vision(s) of the legislative role,[31] or to the question whether there are competing normative theories of the role of representative (as there are with judging) and whether there are shared elements to those different visions (as with judging).

It is understandable that a constitutional law course would focus most attention on the meaning of the Constitution's provisions in contested cases. But in law school, across the curriculum, much more attention is paid to what courts do – to how they are constructed and selected, to who the judges are, to judicial behavior at the trial and appellate level, to different styles of judicial reasoning and argument – than is paid to comparable questions about legislatures. That is, we build a stronger positive foundation for normative reflection on judging than we do for normative reflections about the nature of being a representative.

It may be that it is not in law schools that the most normative attention should be given to the nature of representation; perhaps the role of representatives and the making of statutes in legislative bodies should be treated as subjects for government departments, and the application and interpretation of laws once made for the law schools. But this does not seem in fact to describe the law school curriculum, much of which is devoted to questions of reforming laws, which often (and necessarily) contemplate legislation. What is lacking, however, is a focus on representation, on trying to develop a complex set of

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did at least briefly include materials relevant to the normative self-understanding of the legislator's role. OTTO J. HETZEL, MICHAEL E. LIBONATI, ROBERT F. WILLIAMS, LEGISLATIVE LAW AND STATUTORY INTERPRETATION 81-88 (2008), refers to the question whether a representative sees herself as a Burkean "trustee" for the people, acting independently of their views in the long term interest of the whole, or rather sees herself as a "delegate," to advance the known current interests of the represented; the same source [at least in earlier edition, check if still in 2008] also is the only one of these casebooks to refer to four categories of "representation" made famous by HANNAH FENICHEL PITKIN, CONCEPT OF REPRESENTATION (1967) -- formal representation based on authority, descriptive representation, symbolic representation, and substantive representation (acting for and in the interests of those represented). A quite new casebook does, importantly, raise in the first chapter questions about how judges, legislators, and administrators think about statutes; and with respect to legislators, makes the important point –one central to this paper -- that legislators, unlike judges, "*represent* the public" and openly seek compromise. WILLIAM N. ESKRIDGE, JR., ABBE GLUCK, VICTORIA F. NOURSE, STATUTES, REGULATIONS AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 11 (2014); *see also* ABNER J. MIKVA AND ERIC LANE ,LEGISLATIVE PROCESS 26-27, 444-47 (referring to compromise as "the heart of the legislative process", and briefly discussing the representatives' relationship with those represented including references to the delegate and trustee theories. For further discussion of casebooks, see infra at __ (noting Pamela Karlan, Samuel Issacharoff and Richard Pildes, THE LAW OF DEMOCRACY).

[31] The range of academic literature is broader than what goes on in our classrooms. Some, like Robin West, have argued that legislators do have constitutional duties to fulfill constitutional norms. See, e.g., Robin West, *Tom Paine's Constitution*, 89 Va. L. Rev. 1413 (2003) discussion below. Beyond West's own account of what she sees as constitutional obligations to provide for far greater equality than currently exists, the claim I am advancing here is that whatever the legislator, or her constituents, believe the constitutional vision is – whether of a night watchman state or to advance a socially egalitarian society – legislators may have obligations derived in part from being elected, in part from being elected under the Constitution, to act in certain ways in their capacity as constitutional and democratically elected representatives to advance that normative vision.

normative discourses around representation that might offer an aspirational counterbalance (which understands that legislators' obligations are different from judges) to the more cynical of accounts, and better inform law school discussions of the relationships between legislatures, courts, administrative agencies and other actors in the constitutional system.

II. Elected Representatives Should Be Understood to have Pro-Constitutional Obligations to Act to Promote Working Government

This silence is concerning. One of the lessons from a comparative study of constitutional systems is the importance of what one might call "pro-constitutional" aspirations, attitudes, and behaviors, by democratically elected representatives, as well as other actors throughout the institutions of constitutional democracy and enough portions of civil society and popular culture. I use the term "pro-constitutional," not to refer to any specific obligation of constitutional interpretation that legislators may have, but rather to call attention to their central constitutional role as legislators in a constitutional democracy.

Being an elected representative in a lawmaking body is a normatively very challenging task, given the competing demands - - widely recognized – between short-term electoral accountability, which has deeply attractive and important aspects in a constitutional democracy, and the long term public good (of both particular constituencies and the country as a whole), also a good thing in a constitutional democracy. As Nadia Urbinati has written, "if representatives are to be judged, there should be a norm of 'good' representation."[32] But the norms of being a good representative are quite different than for being a good judge. For example, unlike judges who, no matter how chosen, are supposed to act impartially in adjudication, legislators are elected as representatives of particular constituencies, on whose behalf they are supposed to act, at least part of the time; elected representative, unlike judges, should not necessarily aim to be principled and consistent in all their work on legislation, given the need to work with others to get anything done; unlike judges, legislators are not expected individually to give reasons for most of their actions; unlike federal life-tenured judges, for whom reason-giving is a central form of public accountability, legislators must regularly stand for election where what the public views as their product can in theory be evaluated. Both the need for "pro-constitutional" understandings of the functions of being a "good" representative and the (potential) complexity of what those understandings are is underappreciated.

A. *Why the term "pro-constitutional"?*

Before trying to say more about the attitudes and qualities of a "pro-constitutional' legislator, a few words on the term "pro-constitutional" may be helpful. Is the idea of a "pro-constitutional" representative any different from the idea of a "good legislator"? What obligations inhere in being a representative in a constitutional democracy? Are

[32] NADIA URBINATI, REPRESENTATIVE DEMOCRACY 218 (2006, 2008)

there obligations that flow from the U.S. Constitution that affect the role of an individual representative in the U.S. Congress? Why the term, "pro-constitutional"?

It is the Constitution that provides for the selection of representatives by popular election. In so doing, the Constitution prescribes that the principal law makers of the government are directly chosen in democratic elections.[33] Over time the U.S. commitment to an inclusive notion of the democratic electorate has expanded in the Constitution,[34] accentuating the role of elections in legitimizing government law-making. The representatives' relationship to those who elect him or her is at the heart of U.S. constitutional government.[35] Representative legislatures stand for the proposition that the laws under which we are governed must rest on the consent of the governed, given through their election of the lawmakers and the need for those lawmakers to stand regularly for election.[36] In order for that consent to be meaningful, there are requirements of publicity and transparency so that the people can know and understand the significance of what their representatives have done.[37]

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[33] U.S. Const. art I; Amend. XVII.

[34] See U.S. Const. Amends. XV, XVII, XIX, XXIV, XXVI.

[35] See, e.g., GORDON S. WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION 70-71 (revised ed 2008) ("Representation … was the key in unlocking an understanding of the American political system."); Edward Rubin, *Judicial Review and the Right to Resist*, 97 Geo L J 61, 103 ("[T]he essence of our system is representation; the people elect representatives and the representatives constitute the ruler. This is not an unfortunate compromise with inconveniences of mass society, but an epochal innovation by the Western world in the art of governance."); Mark Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 Wm & Mary L Rev 371 (2012) (arguing that the Constitution embodies a structural principle of "republican legitimacy," which includes the idea that the selection method for representatives must be legitimate, providing a fair mechanism for expression of the people's choice in competitive elections). [Cf. Jeremy Webber, *Democratic Decision Making as the First Principle of Contemporary Constitutionalism*, in THE LEAST EXAMINED BRANCH 411 (Richard W. Bauman and Tsvi Kahana eds 2006) ("[D]emocratic participation…is the first principle of contemporary constitutionalism.")

[36] It is not the case in all constitutional democracies that the legislature is the principal lawmaking body. Although usually this is so, in the current, Fifth French Republic the legislators act in the domain of "lois," but the President has authority to issue "reglements" - and the legislature is prohibited to enact laws in the domain of the President's authority over reglements or regulation. See ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE XXX (1992); Constitution of the Fifth French Republic (1958) Arts. 37 (all matters other than those designated for statute law come within the domain of regulation); *see also* articles 34 (listing the domains of legislation); 41 (giving Constitutional Council jurisdiction to rule on whether a proposal for a statute is unconstitutional insofar as it is "not a matter for statute" but intrudes on the domain of regulation); 47-1 (providing for finance bills to come into legal effect through regulation if parliament fails to take a decision within 70 days); 47-2 (same for social security bills after 50 days). So the fact that in the United States, the "legislative" power is vested in a Congress made up of elected representatives, and includes the power to make all laws necessary and proper to carry out its legislative powers and the powers delegated to other organs of the national government, tightly links elected representatives in the legislature to lawmaking.

[37] On the importance of free access to information to representative government, see generally Bernard Manin, et al, *Introduction*, in DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION 23-24 (Adam Przeworski et al eds. 1999). See also Jeremay Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373, 379 (2003); Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 Corn. L. Rev. 280, 284, 306-07 (2002) (arguing that "contestability", i.e., competitive elections, and "unbiased widely available sources of information" that can be integrated into political discourse are necessary to sustain accountable and public-interested government).

Second, and in addition to the idea of being the principal lawmakers under the Constitution, the broader idea of being a "representative" is invoked, explicitly by the term used for membership in the House and implicitly by the term used for membership in the Senate. Although the term "representative" and the idea of representation has many forms, it is a role distinct from being a "judge."[38] Which of its many meanings is most appropriate depends in part on the fact of having been elected, in part on the fact of being elected to serve in the legislature of a constitutional democracy, and in part on the fact of being elected to serve in the particular legislature constituted by the Constitution and laws of the United States. By virtue of being elected, it can be argued, representatives assume an implicit obligation of faithful service to their constituencies, which at a minimum means they are to act so as to promote the public good, not private interest.[39] Being a pro-constitutional representative refers not only to the obligations of representatives to interpret specific provisions of the constitution as they are relevant to their official duties - though it would include that - -but also and more generally encompasses obligations of serving as a representative under the Constitution.

At least three animating ideas of the Constitution are relevant: workable government; constitutional loyalty; and representative legitimacy. First, an important goal of the Constitution was to create an effective, working government.[40] The Articles of Confederation were regarded, by those motivated to come to Philadelphia in the summer of 1787, as unworkable; major legislation and spending required a super-majority vote of the states,[41] which was often difficult to obtain; states failed to meet obligations to fund the national government; the national government lacked power to regulate its citizens directly, to prevent ruinous economic wars between the states, and to protect the interests of the United States in the international sphere; and amendments were essentially impossible as unanimity was required.[42] The government lacked an executive head, making expeditious and effective action extremely difficult.[43] The

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[38] Being a representative as the principal role of a government actor is different from the adjectivally "representative" characteristics of all government actors. All organs of government can be "representative" of the people, or of their country, in some ways; but the job title representative connotes a different set of responsibilities than the job title of being a judge. In Hannah Pitkin's terms, all members of the government can be "representative" in a "symbolic" or "descriptive" sense; but it is the elected representatives --in both the legislature, with which I am concerned her, or the executive -- who "act for" the people as their direct representatives. HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION XX (19xx).

[39] See T. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671 (2013); Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004) (discussing the framers' conceptions of public officials' fiduciary duties); Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queens L.J. 259 (2005) ; Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699, 710-12 (2013) (noting public officials fiduciary duties); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. Rev. 1249 (2011)].

[40] See, e.g., Federalist No. 70, at 422 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (necessity of an "energetic executive")

[41] See Articles of Confederation, art IX (requiring vote of nine states for many actions).

[42] See generally JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION XX-XX (1996) For a characterization of governance under the Articles as one of See generally , see Teter, supra [infra] note __, 2013 Wis. L. rev. at ___

[43] See, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 [466-67, 550-51] (1969) [(arguing that establishing an effective national executive was a major purpose of the framers in 1787)].

national government was a quite limited, and quite checked one, but it was also widely seen as ineffective. Thus, an important motivating force for adoption of the Constitution was to create an effective, working government; and the extent to which it did so has contributed to its endurance over time. Members of a U.S. government thus have some obligation to maintain a working government, consistent with the spirit of the Constitution.[44]

Second, all elected officials and judges in the United States, including Members of Congress, are required by the Constitution to take an oath or make an affirmation to support the Constitution.[45] Although many national constitutions require such an oath, not all do; in Canada, for example, the oath that is taken swears allegiance to the *monarch* without reference to the constitution.[46] The idea of the Oath or Affirmation clause of Article VI of the Constitution is one of loyalty to the Constitution as a whole.[47] The idea of loyalty to the Constitution bears some resemblance to doctrines in other countries: In Germany the Constitutional Court has found an unwritten constitutional doctrine of "bundestreue" -- which is sometimes translated as "pro-federal loyalty."[48] Although no

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[44] See, e.g., David Pozen, *Self Help and the Separation of Powers*, 124 Yale L J 2, 75-76 (2014) (principle of working and effective government); cf. Benjamin Ewing and Douglas A.. Kyar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 Yale L. J. 350 (2011) (arguing that "liberal anxiety today should focus not just on whether our system of checks and balances can safely constrain collective political action, but also on whether the system can ensure that collective action does happen when it is necessary;" and suggesting that the different organs of government in a divided government constitution can take action designed to "prod" others into action that is needed but not being taken, using as example litigation over climate change); Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148, 148 (2007), http:// yalelawjournal.org/2007/12/10/pildes.html. (arguing that "in modern political practice, the flight from political responsibility--the problem of political abdication-- is at least as serious a threat" as that of expansion of legislative and executive power).

[45] U.S. Const. art VI cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution…")., *See Rosen, supra* note __, at 378 (on significance of oath in committing officials to principle of "republican legitimacy").

[46] See Michel Bedard and James Robertson, Oaths in the Canadian House of Commons, at http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp241-e.ht. Section 128 of the *Constitution Act, 1867* provides that every member of the House of Commons and of the provincial legislatures must take an oath, set forth in Schedule 5, which provides "I, A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria." (A note to the Schedule also provides for substitution of the name of the King or Queen, as appropriate.) Bedard and Robertson, *supra*, write: "As can be seen, the oath is one of allegiance to the monarch, not to Canada or the Canadian Constitution."

[47] See Vicki C Jackson, *Pro-constitutional behavior, political actors, independent courts: A Comment on Geoffrey Stone's Paper*, 2 I.CON 368, 3--, 376 (2004) ("[P]olitical actors play a key role in developing and sustaining constitutionalism by their decisions to engage in … 'proconstitutional' behavior." And defining proconstitutional behavior as " behavior that may not be expressed in terms required by the constitution but that has the purpose and effect of facilitating implementation of constitutional values and commitments"). In that paper I called for the development of a constitutional jurisprudence for nonjudicial actors, id., towards which the instant paper represents an effort.

[48] See Jackson, *Pro-constitutional behavior*, *supra* note 4, at 378 ("[T]he idea of governmental duties to behave in particular ways, even if not fully judicially enforceable, is no stranger to modern constitutional discourse … ."). On Germany and "bundestreue," see DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 61-75 (2d ed. 1997) (using word "profederal" as translation of "Bundestreue" in Television I case, 12 BverfG 205 (1961), and elsewhere defining Bundestreue as a "principle of federal comity"); see also DAVID P. CURRIE, THE CONSTITUTION OF THE

doctrine of comparable force has been articulated in the United States by the Courts, as Daniel Halberstam has shown the idea of something like a reciprocal loyalty among parts to the whole has long been articulated in some U.S. federalism cases.[49] The structure of the Constitution includes checks and balances, but it also separates powers into different roles to enhance the workability of government. Such unwritten implications from the constitution and its structures to impose duties of good faith and fair dealing on parts of the government existing in other constitutional system as well, including Canada.[50] The standards of being a "pro-constitutional" legislator will not necessarily give rise to justiciable claims, since the obligation are not limited to conforming to specific constitutional requirements or prohibitions but more broadly embrace how the role of representation is carried out. Some important textual provisions have been found nonjusticiable,[51] and others, we know, are "under-enforced."[52] But what the Constitution requires to work goes well beyond the group of issues that the courts can adjudicate. The oath may, indeed, be thought of as an additional, "soft" enforcement mechanism, on the premise that men and women will generally take seriously the obligations they publicly avow (or take them more seriously than without such a public vow).[53]

Third, the constitution plainly makes elected representation a central pillar of the legitimacy of government. As noted earlier, the legitimacy derives from their being elected and implies a set of relationships and obligations to one's constituents. But the idea of being elected to act as representatives in a collegial lawmaking body in a way faithful to the Constitution might also carry with it other implication, of behaving in a way that is faithful to, recognizes, the democratic pedigree of the other members of the body. Other members are not enemies, but the opposition, participating ,jointly with the

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FEDERAL REPUBLIC OF GERMANY 77–80 (1994) (treating Bundestreue as a "constitutional analog of the general civil-law duty of an obligor to act in good faith").

[49] Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 Va. L. Rev. 731, ---, 801, 802-16 (2004) (arguing that although the U.S. Constitution has not been interpreted by the Court to establish a general duty of fidelity to "hold the system of divided power together," and is said to rely instead on checks and balances, "a constitutionally grounded concern for the common enterprise is more than occasionally discernible" as in the application of "proper purpose" requirements to taxing and spending measures, intergovernmental immunities, and in dormant commerce clause caselaw)

[50] Thus, in the Secession Reference case, [1998] 2 S.C.R. 217 (Canada), the Supreme Court of Canada drew on unwritten constitutional principles (as it has in a number of other cases) to resolve questions about the legality of a unilateral secession. After concluding that a unilateral secession would not be constitutional, it also concluded that if by a clear vote a clear majority in one province wanted independence, a duty would arise for the rest of Canada to discuss this with the province. Implementation of duty, the Court said, would be for the political organs of government to work out.. The duty, then, was only in part justiciable.

[51] See, e.g., Luther v Borden, 48 U.S. 1 (1849) {Guarantee Clause); Pacific States Tel & Telegraph Co v. v. Oregon, 223 U.S. 118 (1912) (the referendum cases); United States v. Richardson, 418 U.S. 166 (1974) (public accounts of spending clause). Cf. Frederick Schauer, *The Supreme Court, 2005 Term--Foreword: The Court's Agenda--And the Nation's*, 120 Harv. L. Rev. 4 (2006) (arguing that much of what concerns the public, and much of the Constitution, involve nonjusticiable issues).

[52] On under-enforcement of constitutional norms, see LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES (2004).

[53] See Sujit Choudhry, *Popular Revolution or Popular Constitutionalism*, in THE LEAST EXAMINED BRANCH, supra note __, 480, 488 (explaining that the Secession Reference case "held that the rules were both nonjusticiable and legally binding"). A public oath might also be conceived as an explicit invitation to the public and other constitutional actors to evaluate fidelity to the oath.

majority in the governance project; and a healthy opposition is a necessary component of what Rosen calls the "republican legitimacy" of the government under the constitution.

Many aspects of constitutional structure may affect the role obligations of representatives. Two specific aspects of the U.S. Constitution not already mentioned reinforce the idea that representatives have duties, beyond loyalty to the Constitution and to their constituents: For one thing, the role of representative can be more or less independent, during the term of office, from the constituency. In some jurisdictions elected representatives may be given "instructions" by their constituents, which they are obligated to implement; or are subject to recall elections before their term is over. The U.S. Congress is constituted in a way that is more independent. No provision in the Constitution was made either for binding mandates from the people to their representatives, nor for recall of representatives during the term authorized by the Constitution.[54] These decisions reflect an effort to insulate members of Congress from immediate passions and interests and to promote deliberative decision-making - in a process involving other representatives from other states and localities.[55] There may thus be a basis for thinking there is a duty to consider the arguments of others in the Congress: independence during the term of elected office implies, as well, the national and local character of the role of representative: duties to a constituency but also duties to the national polity, of which the deliberative process in Congress assembled is an expression.

Second, the role of representative may differ in a parliamentary and presidential system. For example, in a parliamentary system if the membership looses confidence in the head of government it is entirely appropriate that they so indicate and resort to new elections. But in a presidential system the president is elected separately from the members of the legislature; his (or her) legitimacy is not derivative of the legislatures but is in practice as directly from the people as are members of the legislature. And, as the U.S. Supreme Court has emphasized, the President is the only elected official who can speak for the whole people.[56] Members of Congress, then, may have a duty to recognize the President's democratic legitimacy and to work with him or her in making the

[54] See CASS SUNSTEIN, DESIGNING DEMOCRACY 41 (2001) (noting "the framers' explicit rejection of the 'right to instruct' representatives" and emphasizing the importance of deliberation in public decision-making); Jack Maskell, *Recall of Legislators and Removal of Members of Congress from Office*, Congressional Research Service Report, at 5-7 (noting deliberate decision by the Framers not to include provisions, which had been considered, for recalling members of Congress from service and distinguishing Articles of Confederation under which delegates to the Continental Congress were subject to both instruction and recall). See also THOMAS CRONIN, DIRECT DEMOCRACY 128-32 (1989) (arguing that rejection of right to recall at time the Constitution was ratified represented a conscious effort to remedy defects of Articles of Confederation (which permitted recall), both in failing to have sufficiently national views in the legislature and from excess attention to "shortsighted" passions of the people in their states). But while the rejection of recall and instruction reflects a desire for national and independent views, the allocation of representation represented a rejection of the idea that "virtual" representation, divorced from particular interests of particular constituencies, was democratically legitimate. See generally WOOD, REPRESENTATION IN THE AMERICAN REVOLUTION, supra note __ . History and constitutional structure thus emphasize the complexity of the role of representative reflected in the U.S. constitution.

[55] It is worth noting that each House was authorized to expel members but only by a two-thirds vote, U.S. Const. art I Section __, also a form of protection for the independence of members within the body.

[56] See United States v. Curtiss-Wright Export, Corp, 299 U.S. 304, 319 (1936) (quoting John Marshall in the U.S. House of Representatives); Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S Ct 2076, 2088-89 (2015).

government work for his term of office in a way that differs from legislature's relationships to Prime Ministers in parliamentary systems.[57]

In sum, just as the idea of being a good federal judge draws in part on general concepts of the role of being a judge,[58] in part on the obligations of judging in a constitutional democracy,[59] and in part on the specific structures of the U.S. Constitution,[60] so too, does the idea of a "pro-constitutional representative" draw on the general role of an elected representative, on the role of legislators in constitutional democracies, and -- when discussing U.S. representatives -- on more specific aspects of the U.S. Constitution.[61]

B. Pro-Constitutional Representatives As Actors Motivated by the Public Good and Elected to Serve the Public Good in Ways Connected to their Constituency

Why do people run for office in the first place? Although the empirical political science literature seems to be dominated by a model that focuses on legislative votes, and what public opinion polls show about voter preferences, more normatively focused political scientists acknowledge that representatives have opportunities to contribute to or reshape, as well as simply to express or go along with, public views. Their motivation to reshape public opinion cannot be accounted for simply by a motive to be re-elected. Is the dominant model that we in law school classrooms do impart – of self-interested representatives who collectively, and unpleasantly, produce the laws -- an adequately complete description of what representatives actually do, and care about, across the range of legislative tasks?[62] Of their opportunities to shape the sphere of "public affairs," their capacity to form as well as to express or act on the preferences of their constituents?[63] Does a motivation to be re-elected really explain or account for the range of activities and the range of normative goals a good representative might have?

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[57] Mitch McConnell, as Senate Minority leader, "summed up his plan to National Journal: "The single most important thing we want to achieve is for President Obama to be a one-term president." Andy Barr, "John Boehner: 'We Will Not Compromise'", Politico (Oct 26 2010), http://www.politico.com/news/stories/1010/44311.html. While perfectly legitimate as a political goal, it is arguably inconsistent with the duty to work with the elected president on behalf of the people for this to be the opposition's "most important thing" to achieve.

[58] Most of the ethical rules believed generally to apply to judges also apply ro federal judges - norms of impartiality, of not having a personal financial interest in a matter under decision, norms of engaging in principled decisionmaking.

[59] On these, see Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy,* 116 HARV. L. REV. 16 (2002); JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter and Stephen Breyer eds. 2004).

[60] These include the case or controversy limitations from language of Article III, and the provisions for life tenure and the kind of independence these contemplate.

[61] Other differences between representation in the U.S. Congress and elsewhere, and differences between serving in the House and the Senate, are discussed further below.

[62] See, e.g., HART & SACKS LEGAL PROCESS 696-705 (Eskridge and Frickey eds. 1994 of 1958 tentative edition) (Note on the Business of the Legislature) (describing legislature's work in some detail as extending well beyond taking discrete votes on discrete pieces of legislation).

[63] See DAVID R. MAYHEW, AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE-JAMES MADISON THROUGH NEWT GINGRICh (2000).

The activities of being a "representative" go well beyond votes in committee or on the floor. Representatives have opportunities to introduce proposed legislation, to participate in shaping laws through negotiation, to build and develop legislative agendas. They can hold hearings to highlight problems or build support for ideas. They may develop capacities within the institution to provide expertise, or connections, to others, that can help an institution like a legislature function. The desire to be re-elected is plainly a motivating factor, and a constraint – most of the time for most elected representatives -- but it is not an adequate account of the aspirations of being a representative. A focus only on voting for legislation and the chances for re-election (and raising the money necessary to fund an election campaign) also may obscure the roles of representatives in the attitude formation process.[64]

Political science tends to be dominated by "positive" questions, asking about what representatives do and what motivates them. The normative questions seem be addressed primarily in a political theory literature, some of which in recent years has focused on the nature of representation (in a specific way that goes beyond a longstanding focus on the nature of democracy and its institutions).[65] Could more use of this literature be made in law school classrooms? In the Issacharoff, Karlan and Pildes casebook on election law,[66] the debate over "trustee" vs. "delegate" views,[67] e.g., of Burke, Aristotle and others on

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[64] For discussion of the constructed elements of public opinion and group self-understandings, see, e.g., Courtney Jung, *Critical Liberalism*, in POLITICAL REPRESENTATION (Shapiro, ed.), *supra* note _, at 139, 149-51; Clarissa Riles Hayward, *Making interest: On representation and democratic legitimacy*, in POLITICAL REPRESENTATION (Shapiro ed.) *supra* note __, at 111, 112 (arguing that representation should be understood to include responsibility in "shaping political interests in democracy promoting ways").

[65] Some have suggested that the now classic work by HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967), may have helped suppress other work until very recently. For more recent work of interest, see the exchanges between Jayne Mansbridge, *Rethinking Representation*, 97 APSR 515 (2003); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates and Gyroscopes in the Study of Political Representation and Democracy*, 103 APSR 214 (2009); and Jayne Mansbridge, *Clarifying the Concept of Representation*, 105 APSR 621 (2011). Also see SUZANNE DOVI, THE GOOD REPRESENTATIVE (2007); NADIA URBANATI, REPRESENTATIVE GOVERNMENT (2006, 2008); Andrew Rehfeld, *Towards a General Theory of Political Representation*, 68 J Pol. 1 (2006); Michael Saward, *The Representative Claim,* 5 Cont. Pol. Theory 297 (2006); Michael Saward, *Authorisation and Authenticity: Representation and the Unelected*, 17 J Pol. Phil. 1 (2009). For useful summaries of developments see Nadia Urbinati and Mark Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 Annual Rev. Pol. Sci. 387 (2008); and Suzanne Dovi, *Political Representation*, entry in Stanford Encyclopedia Of Philosophy (2006, Updated 2011), http://plato.stanford.edu/entries/political-representation/ For a thoughtful account of why political theory has neglected a very important element of representation -- the duty at times to compromise - see Warren & Mansbridge, infra note __ (discussing how, inter alia, both Habermas and Sunstein treat legislative "bargaining" as something without positive normative value, as distinct from valuable forms of "deliberation").

[66] SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY (4th ed 2012); *but cf.* DANIEL H. LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 11-14 (5th ed. 2012) (excerpting Edmund Burke's speech) For casebooks on Legislation, see supra note __.

[67] See Jonathan Macey, *Representative Democracy*, 16 Harv. J. L. & Pol. 49, 49-50 (1993) (opposing "pluralist" vision of representing one's constituency with "guardian" vision of promoting the broader interest of all society). A "trustee" or guardian may consider what his constituents think but regards himself as obligated to make an independent judgment in the context of multimember deliberations; a "delegate" views himself generally as more bound by the expressed views of his constituents. As Pitkin has suggested, a representative might think of herself in both ways – as having obligations to be responsive to constituents but also as having obligations to think and vote independently. Indeed, Pitkin suggests, being

representation are briefly introduced – but generally with a focus on the goals of democracy itself, whether those goals are idealistic and public spirited, seeking a common good, or rather are more centered on regulating a power competition among economic (or other) groups; and with attention not so much to the normatively good legislator but to the normative justification for democracy itself. Of course the two are closely linked: one cannot have a conception of a good legislator without a normative concept of why democracy and of what the legislature as a body should do.[68] But there are benefits to be had from focusing some of our discussion on what the elected representatives themselves ought to be thinking about, if they are to regard themselves and be regarded by others as good representatives.

Although there are formal conceptions of being a representative that require nothing more than formal authorization,[69] the job of "representatives" is not just to "vote" but to *act* as a representative. Unlike judges, who in our society act only when called on by specific events initiated by other parties in a formalized process, it is a mistake to think of representatives as merely showing up and voting. Representatives need **to act** – they need to legislate, to make provision for laws that will enable programs to be worked out, presumably for the welfare of their people.

Cass Sunstein emphasized a related point about constitutions years ago – that they are designed not only to constrain but to empower and facilitate governance towards good public ends.[70] Such "governance" is enabled or carried out, at least in important part, by elected representatives. And the carrying out that is implicit in the holding of a constitutional office is facilitated by a set of "pro-constitutional" representative functions and attitudes, that warrant the attention of constitutionalists.

In 1787, after the U.S. Constitution was drafted, several noteworthy things happened. Ratifying conventions were in fact organized and held. They debated and they reached conclusions by substantively voting on the measures. Once the Constitution was

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a 'representative" requires some oscillation between these two modes - so as to render those represented "present" in some way, but recognizing that it is the representative, not the represented, who is actually "present " in a deliberative, collegial body, where information is exchanged and views may change through collegial discussion. For these reasons, in part, Macey is incorrect to say that by rejecting "virtual" reprsentationas a theory, the Framers necessarily rejected a view that sometimes, representatives shoud act more independently of their constituencies, Macey, *supra* at 50 - a role concept reflected in the rejection of provisions for recall or instruction of members of the national Congress. But cf Jonathan R Macey, *The Missing Element in the Republican Revival*, 97 Yale L J 1673, 1674 (1988) (framers' plan was to hope for republicanism but prepare for pluralism).

[68] On differences between the qualities of a legislature and the qualities of its members, see Vermeule, *Forward: System Effects*, *supra* note __, at ___, 40-42 (suggesting that for example, the biases of individual members of a collective body may cancel out, depending on their distribution)

[69] Pitkin offers four distinct views of representation – a formal view (mere fact of authorizing is what makes someone a representative); "symbolic" representation, in which a representative "stands for" the represented, as measured by how much the representative is accepted by her constituents; a "descriptive" understanding, in which the question is how much does the representative resemble her constituents; and a "substantive" view, that a representative should "act for" her constituents, that is, by advocating for their policy preferences. This summary of Pitkin draws on Dovi's entry in the Stanford Encyclopedia of Philosophy.

[70] Cass Sunstein, *Constitutionalism and Secession*, 58 U. Chi. L. Rev. 633 (1991).

ratified, elections for national office were also actually held. Once representatives were chosen, they actually trekked – no small thing – to New York to meet in Congress assembled. And while there, they legislated into existence a national government.[71] The point at which I am driving was that it took a willingness to commit, to act, on behalf of making the constitutional government come into being and work.

The importance of pro-constitutional action is evident in several contexts. U.S. federal elections have always been held for national office on schedule, even during war. When opposition parties won, power has been handed over; and even when it was questionable, power has been handed over upon the decision of an apparently authorized institutional decisionmaker.[72] For another example: The U.S. Census, which is in some ways a necessary part of the infrastructure for the democratic, constitutional legitimacy of the House of Representatives, has always been taken, every ten years, as called for in the Constitution.[73] There are areas in which, in the past, and perhaps today, constitutional derelictions of duty in the political branches may have occurred. My point here is that it is possible to have a conversation about the obligations of elected representatives under the Constitution that has no connection to what courts will be able to decide. Indeed, it is one of my claims that an under-appreciated responsibility of elected representatives is to continue the never-ending task of participating in making a government that works.[74]

Robin West has vigorously argued that law schools should refocus attention on legislators.[75] I share some of her concern about the "unchecked valorization" of the judge as compared to the legislator. As she notes, casebooks and law school corridors are bedecked with pictures of Judges -- "Holmes, Hand or Cardozo", but not of great legislators – "Daniel Webster, Ted Kennedy" or, perhaps, Phil Hart. As portrayed in law schools, she argues, judges debate, deliberate and reason, based on "encyclopedic knowledge" and with "eye on the future"; the legislator "reacts to constituent desire on the basis of his desire to stay in their good graces." These ideas of the good judge and the bad legislator, she argues, are related to the idea that "law" – which comes from courts, is good -- and "politics," which produces statutes, is bad. Just as the realists and crits have

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[71] On the activities of the First Congress, see, e.g., David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. Law School Roundtable 161 (1995). I am not suggesting that these actions and the attitudes that underlay them sprang from nowhere; there was an experience of governing in both the separate states and through the government organized under the Articles.

[72] See, e.g., Bush v. Gore, 531 U.S. 98 (2000), and its aftermath.

[73] MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 2 (1988). This is not always true in democracies; compare Tennessee's failure to reapportion itself between roughly 1900 and the time of *Baker v Carr*.

[74] On how the design of the constitution should be understood to promote not only checks on government but an effective and working government, see, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 Yale L. J. 2, 75-77 (2014). Cf. Jeremy Webber, *Democratic DecisionMaking as the First principle of Contemporary constitutionalism*, in THE LEAST EXAMINED BRANCH , supra note __ at 411, 411 (2006) ("[C]onstitutions are not primarily about limiting government" but to "constitute government" by "specify[ing] the processes by which public decisions are made. … This is a positive role, a role that e*nables* public action, not one that is adequately captured through the concept of limits.")

[75] See Robin West, *Toward the Study of The Legislated Constitution*, 72 Ohio St. L.J. 1343 (2011); ROBIN WEST, TEACHING LAW 111-14 (2014).

opened eyes that judging is not only about principle, but also about politics, so, she argues, we should look for the "legalist" impulse in politics.[76] "We have not shifted our baseline assumption that politics is lacking in reason." We do not assume that legislators may have "genuine desire to serve the general welfare; that the legislator can be reasonable, and principled and judicious."[77] Although I would not go so far as to say that legislators can be as "principled" as judges – indeed, I do not think that is their job description -- , I agree with West that our approach in the law schools has failed to recognize the often "genuine desire to serve the general welfare" that motivates people to seek public office in the first place and that continues to animate at least some of what they do in public service. She writes with particular force that because the center of what judges see as their calling is to treat like cases alike, the courts have construed the equal protection clause as a negative constraint requiring "rational sorting" by the legislators; in legislative hands, she argues, a "legislated constitution" of obligation to assure 'equal protection" might, indeed should, look very different. And, in ways consistent with the work on the constitution outside the courts of Mark Tushnet, Larry Kramer and others,[78] she urges that law schools begin to ask what a "legislated constitution" – that is, a constitution given meaning through legislative acts (statutes) and interpretations – would look like.

What I would like to add to this is the idea that legislators, like judges, have some core obligations at the heart of their calling as legislative representatives in a constitutional democracy. As noted earlier, these core obligations are in important respects quite different from the core obligations of judges; moreover, the obligations of representatives are in real tension with each other, embracing as they do both responsiveness to constituents and responsibility for the public welfare of the country as a whole, as well as responsibilities to comply with constitutional constraints and mandates.

Part of the core "mandate" of being a representative in a constitutional democracy is, in some respects trans-substantive –it is to act on behalf of and as if they are a part of a working, ongoing government, that will continue to function beyond their term, on behalf of a society that likewise has existed in the past and will exist in the future. In this respect, then, I want to draw some distinction between the idea that the Constitution contemplates affirmative (albeit nonjusticiable) obligations for those it calls "representatives" or "senators", on the one hand, and the substantive content of those obligations. That is, one could have a very different conception of what the affirmative measures the Constitution requires are than that for which Professor West argues, but still agree, in principle, that legislators have affirmative obligations under the Constitution and as elected representatives towards the future – the future of one's constituency, of one's institution, of one's country, and, increasingly, the future of the increasingly inter-connected world.

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[76] For a thoughtful effort to reveal and understand the "legalism" in congressional lawmaking through the "rules" for legislation in the Congress, and their connection to understanding what a piece of legislation means, see Victoria Nourse, *A Decision Theory of Statutory Interpretation*, 122 Yale L.J. 70-152 (2012).
[77] West, supra note __, at 1364.
[78] See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)

So the idea of "pro-constitutional" behavior includes participating in making and keeping going a government that works under the Constitution.[79] This is an obligation, whether one is in the majority or minority. It is part of what the Constitution contemplates is entailed in being a "representative" or "senator", "elected by the people," in the Congress of the United States. Opposition is essential to democratic government; it is essential that opposition not be equated with "disloyalty."[80] But, the idea of pro-constitutional behavior suggests that opposition by elected officials must be conducted in ways consistent with the obligation of all constitutional officers to participate in making constitutional government work, rather than to make constitutional government fail.[81]

C. Defining Pro-Constitutional Attitudes and Responsibilities[82]

The task of defining "pro-constitutional" behavior for elected representatives is more complex than the analogous task of defining pro-constitutional behavior by judges.

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[79] Cf. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 178-79 (1997)((writing on the "poisitive constitutionalism" of John Stuart Mill and his conception of the "creative rather than merely protective functions" of liberal-democratic institutions; arguing that Locke envisioned representative government as a process of "public learning" and representative institutions as locations to advance "publicly useful knowledge").

[80] Waldron, *The Principle of Loyal Opposition* (May 2012). NYU School of Law, Public Law Research Paper No. 12-22. *Available at*: SSRN http://ssrn.com/abstract=2045647SSRN paper; David Fontana, *Government in Opposition*, 119 Yale 548 (2009). For this reason, attitudes expressed in the apportionment process, on both sides of the political spectrum about "killing" the opposing party through gerrymandering are, if understandable, also concerning. See Rosen, supra note __ , at __ [quoting statements by legislators engaged in redistricting).

[81] Waldron evidently would not treat the idea of a loyal opposition as imposing any constraints on what the opposition does; indeed, he seems to reject all efforts to fill in the term "loyal to what," and emphasizes rather the message to those with a majority of the loyalty of the opposition. *See id.* at 31-41. Yet as he describes the idea of the loyal opposition in Britain, it is an opposition – fierce, and partisan to be sure – but one that is also "disciplined" by the responsibility to be ready to take over the government and run it. *See id.* at 11-14. Thus, Waldron notes that, apart from critiquing and holding accountable the existing government, the main role of the opposition is "to prepare for government," and he suggests that "[t]he duty to provide a government in waiting influences how [the] duty of critique is performed." *Id*. at 13. Having to have a consistent program, the paper suggests, imposes a certain responsibility. *See id.* at 14. Waldron quotes Jennings on how "irresponsible opposition" is not part of democratic government, and Burke on the benefits of a "regulated" rivalry, arguing that what regulates the competition is not loyalty as such but the prospects of actually having to govern. *Id.*

[82] A caveat: Much of the recent political science literature focuses on forms of political representation that are not authorized through territorial constituencies' voting. I am focused here primarily on only one particular form of being a political representative: being an elected member from a single constituency in the U.S. separation of powers system. There may be differences in the responsibilities and duties – or in the balance among the obligations – of representatives selected through party lists in a proportional representation system and representatives in single constituency winner take all elections. There may also be differences in the balance of obligations for members of legislatures in a parliamentary system and those in a separation of powers system. (I will try to address these briefly in the final section.) And there may be differences in the obligations of representatives who are not elected (e.g., heads of self-designated NGOs that are active in the legislative arena), or who are not selected in a constitutional democracy. These are for the moment beyond the scope of this paper

The ethics, virtues and desirable attitudes or habits of mind of an elected representative cannot be expected entirely to overlap with those of a judge; they are different roles, with different tasks. Some lines are drawn with relative clarity about the role of a judge -- to be principled, consistent, and impartial. For a representative, it seems much harder – what is the core? Ian Shapiro writes: "If representatives follow Burke's ([1790], 1969) admonition not to sacrifice their judgment to the opinions of their constituents, they are vulnerable to charges of elitism, yet if their actions reflect the vicissitudes of public opinion, then they are 'pandering.' In short, representation is an elusive notion in democracies, a seemingly inevitable practice whose legitimacy is inescapably suspect."[83] What – if any -- norms of impartiality towards all constituents, or the whole country, do members have? Would we really want representatives who are as "principled" in their actins in public office as judges? That the federal constitution subjects representatives, but not judges, to frequent elections, suggest not.[84] Do we rather want representatives who can work with, compromise with, other representatives to produce a product - legislation - that can function as law?[85] Accountability, to be sure, is an important part of being a representative -- but to whom or what? – the people who elected you? your whole constituency? To the country as a whole? to your political party? to the legislature of which you serve as a part? Or even, to a limited extent, to those beyond the country who are affected by your action/inaction? "Accountability" has something of an 'after-the-fact' quality to it; is there more to being a good representative than being accountable to the right constituencies or stakeholders?

I am not sure there is one single normative conceptualization that will capture the range of ways of being a good representative and the range of considerations that inform judgments of the right course of action for a conscientious representative.[86] There are to be sure the "shalt nots" – thou shalt not take bribes for legislative votes, nor engage in extortionate misuse of the office. There are also the important constitutional "shalt nots" – thou shalt not pass a law abridging the freedom of speech, or establishing religion. Such constitutional commandments certainly embrace a role for representatives

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[83] IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 58 (2003); see Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), in [I THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 446-48 (London: Henry G. Bohn, 1854--56)]. Shapiro praises Schumpeter's insight that, in a representative democracy "power is acquired only through competition and held for a limited duration," and grounded its effort to control power through the incentives of competition; where many offices are noncompetitive, however, the theory does not hold. SHAPIRO, supra, at __. This "competitive" model provides a conception of representation that will, at first thought, seem only rarely support a representative's exercise of judgment that is independent from what the representative belies his or her constituents want or will accept; yet the recognition that a representative may try to lead public opinion gives considerable more substance to the possibility of an "independent" model of representation within a competitive system.

[84] As does the oft-made claim that legislation (and legislators) can draw arbitrary lines, forbidden to the courts to draw.

[85] See Russel Hardin, *An Exact Epitome of the People*, in THE LEAST EXAMINED BRANCH, supra note __, at 37 ("A legislature is a compromise.")

[86] Moreover, as suggested above, the balance of obligations (which obligations weigh more heavily) may be quite different depending on the particular kind of representative system one serves in -- for one elected as a representative from a single member district in a system like that in the U.S., than for one elected as a representative on a party "list" in a proportional representation system, as an example.

themselves to develop an understanding of what those constitutional prohibitions and limits are.

But what are the positive, "thou shalts"? What does it mean to give a good account of oneself as a representative?[87] And can we really evaluate the product of legislative bodies if we do not have some understanding of this question?

1. **Acting as Part of Ongoing Government**: As argued in Part B above, perhaps one could say, first, that an elected representative has some obligation to make the government in which she serves work for the people – that is, to govern, to act, rather than simply to obstruct. I recognize that a representative may have a conception that "obstructing" "big government" projects, or some trends, is both the right thing to do and what she or he was elected to do. But even so, standing for Congress and being elected surely can be understood to carry with it an obligation to participate, affirmatively, in governance, even if only for those most basic functions of a state and those by implication required by the Constitution (e.g., to guarantee a republican form of government).[88]

2. **Being Sufficiently "Present" to "Represent":** Second, we might say that representatives have some obligation to be sufficiently active and present in the legislature so as to achieve some minimum level of in fact "representing" – making her constituency, its mix of views, values, interests, conflicts – "present" in the larger body so that the larger body's work has democrat legitimacy vis-a-vis the constituency.[89] In both of these capacities, a representative may have obligations to advocate for goals or positions,[90] as well as to check and question initiatives of the executive branch, to monitor and provide oversight of existing programs and to consider the need for legislative change. Some of these obligations might be captured under the idea of "responsiveness" to constituents. Such responsiveness might be seen as having dual components: developing and advancing policy preferences of constituents while checking developments ones' constituents oppose, and, in the U.S. system, providing constituent service on individual matters, as discussed further below in point 3.[91]

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[87] For one kind of answer, see DOVI, THE GOOD REPRESENTATIVE, supra note __, at 88-91 discussing the idea of "democratic advocacy" as an obligation of the good representative; and discussing the "virtues" of fair-mindedness, which I pick up on below; "critical trust building"; and "good gatekeeping". Her account has influenced some of what follows.

[88] Cf. Pildes, *Political Avoidance, Constitutional Theory and the VRA*, Yale L J Pocket Part 2007, on "avoidance" and abdication of responsibility by elected representatives.

[89] See PITKIN, supra note __ (on "making present" those represented).

[90] In addition to DOVI, supra note __, see NADIA URBINATI, REPRESENTATIVE DEMOCRACY 44-48 (2006) (linking advocacy roles of representatives to the possibility of legislation reflecting judgments about what is just).

[91] For an older study suggesting that responsiveness to individual constituent problems has increased, while collective "responsiveness" to public views has declined, see Stephen Ansolabehere, David Brady and Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness,* 22 Brit. J. Pol. Sci. 21, 27-29 (1992), cited in Nathaniel Persilly, *In Defense of Foxes Guarding Henhouses*, 116 Harv. L Rev. 649, xxx (2002)

3. **Being "Responsive" and "Accountable": Two-Way Exchanges of Information:** Third, some core responsibilities of listening to, advocating for, and providing information to voters may derive from being a democratically elected representative, who can remain in office only by winning a (presumptively, if not actually) competitive election.[92] As noted, part of the core of being a representative is to be "accountable" to one's constituency (which is not necessarily the same as being "responsive;" there is l debate over the balance between the "responsivenesss" and the "independence" that it is normatively desirable and politically possible for elected representatives to enjoy).

Does this obligation of accountability imply obligations to listen, to respond and to provide information? Does it entail obligations of advocacy -advocating for the interests of ine's constieunts; advocating to one's constituents what the representative believes the bets answer is? On most theories of the role of a representative in a democracy, there must be some form of accountability to voters, of behaving so that the voters in your constituency can evaluate your work – whether representation is seen as a "promissory" grant of authority, in which the voters look back to see if the representative fulfilled promises, or a more "anticipatory" model, in which representatives try to anticipate voters' views at the time of the next election, or instead a more "gyroscopic" form of representation by one elected because the constituency trusts the representative to make independent decisions but retains power to fail to reelect the representative if her account of her actions as a representative is not satisfying.[93] Some argue that the "accountability" function is best satisfied by direct communications by the representative, e.g., over the internet, or social media, explaining each of his/her votes or other actions to the voters.[94] But few would argue – on *any* theory of being a democratic representative – that there is no need for any flow of opinion and information to and from voters about the representative's performance.[95]

Information flow -- about the issues confronting our government and about the position of different parties or candidates on those issues -- is in theory essential.

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[92] On the importance of actual competition to democratic legitimacy, see Issacharoff, *Gerrymandering and Political Cartels*, supra note __.

[93] These terms are drawn primarily from Mansbridge (2003). Per Mansbridge: "Promissory" theories view the representative as having an obligation to keep promises made in the past to constituents; if the representative fails to do so, the sanction is not being reelected. "Anticipatory" approaches envision the representative as having an obligation to anticipate what his constituents will approve of at the next election. Each of these could be understood as a form of a "mandate" or "delegate" model of representation. "Gyroscopic" representatives, a theory Mansbridge has developed, reach decisions without much conscious regard for their representatives' views; if the voters *select* a representative who mirrors them, a gyroscopic representative will reflect their views while exercising independent judgment. Gyroscopic models combined with a focus on voters' powers of selection may be seen to produce a non-elitist version of Burke's "trustee" model.

[94] Steven Jackson, Ethics of Representation (unpublished mss. Fall 2012) (discussing "conversational" model of representation).

[95] S*ee* URBINATI, *supra* note __, at 49-52, (developing idea of "representativity" and of "reflexive adhesion," and linking them to Benjamin Constant's idea that political representation has two levels -- representation of the people's will as expressed in elections and representation of changes in public opinion between elections).

Whether one conceives of electing representatives as subject to voter mandates or voter accountability,[96] or of representative government as serving the public good through interest group pluralism or through more deliberative conceptions of democracy,[97] information flow permitting evaluation of competing options is critical.[98]

4. **Providing Assistance Fairly and Impartially to Constituents:** Fourth, do members of Congress, as representatives, have obligations to provide their constituents with assistance in dealing with other parts of the government, such as executive branch agencies? Should these obligations be conceived as arising out of the representative-constituent relationship, or also (or rather) as reflecting a "checking" function of legislators on whether executive departments are properly carrying out the laws?[99]

More contestably, do representatives have obligations of fairness in dealing with their constituents,[100] even those with whom they disagree?[101] Justices of the Supreme Court have said that "[a]n individual or a group of individuals who votes for a losing

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[96] See, e.g., Bernard Manin, et al., *Elections and Representation*, in PRZEWORKSI, ET AL, DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION, supra, at 29-51; [other cites?]

[97] Compare, e.g., ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (195) (illuminating interest-group pluralist accounts of democracy under which representative democracy works through coalitions based on the interests of different groups) and DAVID B, TRUMAN, THE GOVERNMENTAL PROCESS (1951) with AMY GUTMANN AND DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1987) (emphasizing civic virtue in participatory self-government); Michael Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 Fordham L. Rev. 2 (1997) (defending civic republicanism) ; and the essays in [Mansbridge, J. (ed.), 1990, *Beyond Self-Interest*,]. Cf. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY [ch. XX1] (1956) (envisioning the best form of democracy as one characterized by voting for competing elite leadership rather than broader forms of participation). Neo-liberal accounts may be treated as theories of democracy but they can perhaps be better viewed as theories of liberal protection of economic values based on the market.

[98] BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 197 (1997) (emphasizing importance of "trial by discussion" where one party tries to change opinions of another based on impersonal or long term factors); SUNSTEIN, PARTIAL CONSTITUTION, supra note __, at __ (noting need for deliberation both with those who are like-minded, at times, and with those who are not, at other times); cf. Schacter, *Political Accountability*, supra note __at 52-53 (noting but critiquing literature arguing that that even if few voters were well informed, those well-informed voters can play important role in accountability). Manin notes the significance of shared understandings of facts, made possible by "neutral" channels of communication; he contrasts French public opinion at the time of the Dreyfus affair which, he argues, was divided as to the facts because political parties controlled the media which people read, and Watergate, when there was a shared sense of the facts among people of different parties because, he says, the principal media of communication were not controlled by parties. If today more people receive their information from likeminded channels of communication affiliated with political parties, this poses more of a challenge to the kind of exchange both interest-based and deliberative/civic virtue based theories depend.

[99] Cf. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 702 (1994) (describing members of legislature as having the "job of serving as intermediary between constituents and the numerous branches of the executive department with which they have to deal " and suggesting that "[i]n an important sense, the Congressman carries the responsibility here to see that the executive action is lawful").

[100] On the advantage of single member districts in strengthening the relationship of representative to constituents, see Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. Chi. Legal F. 205 229-31.

[101] Cf. Warren & Mansbridge, infra note__ (defining as an element of just public deliberation fairness in terms of including all affected interest sin the discussion).

candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district."[102] If so, would representatives have obligations of fair dealing with all their constituents?[103] This may arise when constituents come to their district or state representatives with requests for assistance. But it may also arise in thinking about representatives' duties to communicate, noted above and elaborated below.

Are there obligations of fairness in providing information to their constituents about policy issues in an effort to influence their judgments? in seeking to win election or reelection? It surely is the case that democracy can benefit from passionate, one-sided presentations on various sides of issues; a free press, and freedoms of speech can help to secure this possibility. Are representatives in some sense more like legal advocates, legitimately arguing for one position? Do they have obligations of accuracy in so doing? Or do representatives have special obligations of fairness in the discussion and presentation of information relevant to the public? Do they have an obligation to avoid providing information so one-sided as to be "propaganda"? Or is such one-sidedeness a normatively neutral or good activity given the welter of other sources and potential rivals?

5. **Opinion Leadership:** Fifth, do representatives sometimes have obligations of opinion leadership?[104] One-way models of transmission of constituents' preferences do not seem accurately to capture what many representatives do. On at least some issues some representatives might see themselves not merely as a faithful reporter or recorder or transmitter of constituents' views but as being in a conversation with constituents, in which appropriate and better views are worked out, the representative's views being informed not only by her constituents but by what she/he learns from other representatives in the Congress. Are there obligations of representatives to exercise leadership when, for example, her constituency's understanding of its own interest is framed in too short term a time frame? Do representatives have responsibilities affirmatively to speak out and provide information, to assist in legitimate opinion formation towards the goal of constitutional, effective and workable government?

6. **Compromise:** Sixth, do representatives ever have an obligation to compromise?[105] This may be an especially difficult question for constitutional law

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[102] Davis v. Bandemer, 478 U.S. 109, 132 (1986) (White, J., joined by Brennan, marshall and Blakcmun). In the next sentence, Justice White seems to equate "adequacy" of representing the losers' interests with anything short of "entirely ignoring" them: "We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters." *Id.*

[103] Cf. NADIA URBINATI, REPRESENTATIVE DEMOCRACY 58 (2006) (representatives should have a "double identity," one partisan, one general); *id.* at 42-43 (representation requires "proportionality" in representation in the sense of views being heard and considered).

[104] Cf. Issacharoff, *Gerrymandering and Political Cartels*, *supra* note __, at 622 (arguing that important measures of political legitimacy from competitive elections "are forced to attempt to educate and influence the voting public, and are in a deep sense accountable to changes in the preferences of the electorate").

[105] More generally, see AMY GUTMANN AND DENNIS THOMPSON, THE SPIRIT OF COMPROMISE (2012). For discussion of compromise in U.S. constitution-making and constitutional law, see, e.g., Sanford Levinson, *Compromise and Constitutionalism*, 38 Pepp. L. Rev. 5 (2011) (applying distinction between "bad" and "rotten" compromises); Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other)*

professors to consider in a discussion of what being a normatively good constitutional legislator entails; the influence of judicial modes of decisionmaking according to principles of consistency may lead us to believe that compromise is always or usually a bad thing; whether judges on multi-member courts should compromise to produce a unified opinion or write separately continues to provoke disagreement and discussion. But for a multi-member, heterogenous democratic *legislative* assembly, the "spirit of compromise" is an essential attribute to get done the public's work of governing; or, it is essential unless a single mindset has a very dominant majority in the legislature, a situation that brings with it other problems in a democracy.

As Warren & Mansbridge put it, "the capacity to act is an integral part of the meaning of democracy;"[106] legislatures that lack the capacity to negotiate and compromise cannot fulfill basic functions of legislatures in a democracy.[107] This may not mean that every legislator must have the spirit of compromise; but enough members must in order to enable the legislature to work.[108] Legislators that lack the ability to engage in good negotiation processes will fail to reach compromises that would have substantial public support and advance the common good; thus, in Warren & Mansbridge's terms, such gridlock reduces the normative legitimacy of the legislatures. Moreover, as an empirical matter, legislatures that gridlock tend to lead to power migration to other institutions and to loss of public confidence in the legislature.[109]

Compromises: A Comment on Sanford Levinson's Compromise and Constitutionalism, 38 Pepp. L. Rev. 903 (201x) (arguing that "compromise is sometimes a moral good in itself"); Vicki C. Jackson, *Principle And Compromise In Constitutional Adjudication: The Eleventh Amendment And State Sovereign Immunity*, 75 Notre Dame L. Rev. 953 (2000) (arguing that some constitutional provisions represent "compromises," and some represent "principles" and should be interpreted accordingly); John Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1940 (2011) (arguing that because the constitution is a "bundle of compromises," separation of powers issues should be decided by ordinary interpretation in light of Congress' broad powers under the necessary and proper clause), and the role of compromise; cf. ROBERT MNOOKIN, BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT (2010) (rejecting "categorical answers" to the question posed by the book's title).]

[106] Mark Warren & Jayne Mansbridge, with André Bächtiger, Maxwell A. Cameron, Simone Chambers, John Ferejohn, Alan Jacobs, Jack Knight, Daniel Naurin, Melissa Schwartzberg, Yael Tamir, Dennis Thompson, and Melissa Williams, *Deliberative Negotiation* (paper presented February 2104, Harvard Law School).

[107] See Richard Pildes, *Romanticizing Democracy*, Political Fragmentation, 124 Yale L J 804, 845 (2014) ("[E]ffective governance inevitably requires negotiation, particularly in our separated-powers system.")

[108] Query if there is an obligation to respect co-legislators, as having been elected by other people in the overall nation, which is a grounding for felt obligations to compromise? On the "decline of compromise" in the Congress, see Carl Hulse and Jeremy W. Peters, "Struggle over Government Funding Points to the Decline of Compromise," N.Y. Times (Dec. 12, 2014) ("The near collapse of a critical government-wide funding bill that now faces a Senate test underscored a fundamental problem with Congress -- the lost art of compromise." "Seasoned lawmakers and congressional aides watched in amazement the near failure of a measure that was endorsed by the majority leadership of both the House and the Senate and President Obama and contained dozens of provisions sought by both parties. They acknowledge that the deep partisanship and procedural disorder of recent years have taken a significant toll on the ability of the House and Senate to get things done."). See also supra note __ (noting article concerning Boehner's declaration of "no compromise"]

[109] See Pildes, *Romanticizing Democracy*, supra note __ , at __; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("[No] decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . .[O]nly Congress itself can

7**. Acting on Matters that Other Jurisdictions Cannot Handle Effectively**: Seventh, focusing on federal representatives: do the constitutional grants of power over, e.g., federal taxes and budgets, over interstate commerce, bankruptcy, copyright and patents, or (even) elections contemplate a duty to act, a level of responsibility and attention, such that if things are going wrong, those with power to act have some responsibility to consider acting to fulfill the goals of the Constitution and of the grants of power? (Recall that I am not talking about justiciable obligations, but rather, an enriched understanding of the constitutional role of legislators.) Congress has power to regulate the "manner" of congressional elections; do recent events suggest that representatives have a duty at least to consider further exercising this power (e.g., by standardizing voting machines, or limiting barriers to voting in federal elections)?

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Accountability to multiple and potentially conflicting stakeholders: Why is it so much harder to develop useful normative frameworks for being a "good" elected representatives than for being a "good" judge? In the case of elected representatives, just thinking about the range of stakeholders to whom one might have obligations of accountability is enough to make the head spin.[110] There are, of course, the voters who elected you, and the voters who voted against you in your constituency, and nonvoters in your constituency (whose well-being may influence voters), as well as those in your constituency who you hope will vote for you in the future.[111] There are voters in the broader polity of which all are a part, and those who are not voters at all but are affected by what one does. One might also feel obligations to fellow representatives, or congressional leadership, to say nothing about one's party,[112] or one's institution as such (the House, the Senate, the Congress).

Maybe one of the reasons for the relative flatness of this literature in law is that it is a much harder project to engage in than the normative discourses around good judging; putting to one side the situation of elected judges, judicial accountability, however hard to define, seems to involve a smaller range of stakeholders with more indirect interests. But a better understanding of what, aspirationally, representatives *should* do – with no doubt a range of normatively complicated views -- will better enable evaluation of what

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prevent power from slipping through its fingers."); Teter, supra note __ at 1152-55 (arguing that gridlock over the debt ceiling in 2011 had tendency to push the President to take one of several actions, any of which would have involved assertion of an unprecedented executive power).

[110] Cf. OTTO J. HETZEL, MICHAEL E. LIBONATI, ROBERT F. WILLIAMS, LEGISLATIVE LAW AND STATUTORY INTERPRETATION 81-88 (2008) (drawing from DAVID J. VOGLER, THE POLITICS OF CONGRESS (1988) to distinguish between the representative's "style of representation" - as "trustee" or as "delegate", and the representative's "focus of representation" - - " whether legislators think primarily in terms of the whole nation, in terms of their constituencies, or some combination of these").

[111] Cf. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 53 (2007) (suggesting that legislators concerned about reelection " will consider potential preferences of the inattentive public and the likelihood that voters will focus on these preferences at election time").

[112] See Richard Pildes, *Romanticizing Democracy, Political Fragmentation*, etc., Yale L J (2014) (suggesting that problems of governance might be mitigated by stronger political parties)

they *do* do – individually, and acting together to legislate. [113] Discussing these issues in the context of the multiple normative demands on an elected representative, taking account of the normative values behind the fact of election and standing for reelection, reveals, I think, how complex and challenging it can be to act as a good representative (and perhaps especially in a non-parliamentary system like that in the US).

D. Examples Illustrating Application of Criteria for Pro-Constitutional Behavior

Some examples will illustrate the complexity of applying these criteria to evaluate particular actions; yet, I hope, the discussion will also suggest the benefits of trying to define with more acuity the range of normative considerations -- including but not limited to the desire to be reelected – that representatives should consider.

Consider some recent episodes of constitutional conflict between Congress and the President. The first involves the refusal to confirm nominees for authorized agencies, for example, Richard Cordray for the Consumer Financial Protection Bureau.[114] The refusal, let us assume, is not based on objections to Cordray's qualifications, but rather, objections of some members of the Senate to the design of the statute enacted by a prior Congress.[115]

To begin with, it is clear that senators have constitutional authority to refuse to confirm. There is no justiciable obligation even to vote on proposed nominees. And it might be argued that, given the power, Senators can legitimately use it to try to elicit concessions from other actors to amend the underlying statute.

Yet it might be argued that there is (or there was and should now be) a constitutional convention that generally favors an up or down vote on presidential

[113] An important question is the difference between discussing obligations of legislators as individuals and obligations of a representative body as a whole. See Vermeule, Foreword, supra note __. Waldron suggests that an advantage or virtue of representative lawmaking (over direct democracy) is that representatives can engage in what Waldron calls "abstraction" -- of distancing themselves enough from particular concrete situations to be able to frame laws at the right levels of generality. Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. Rev. 335, 349 (2009) ("representatives should present people's interests, concerns and ideals, universalizably, under certain aspects"). Describing Urbinati's work, Waldron says, she argues that " representation "helps to depersonalize claims and opinions" in a way that makes deliberation easier." *Id.* at 350. Can one deduce obligations for individual legislators from this aspect of representative lawmaking? Or is the ability to "abstract" one that only be evaluated across the entire legislature?

[114] For useful accounts of this episode, see, e.g., Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers,* 2013, Wis. L. Rev.1097, 1150-51 (2013); [[Jeff VanDam, The Kill Switch: The New Battle over Presidential Appointments, 107 Nw. U. L. Rev. 361 (2012); John C. Roberts, The Struggle over Executive Appointments, 2014 Utah L. Rev. 725 (2014); Alexander M. Wolf, Taking Back Whats' Theirs: The Recess Appointments Clause, Pro-forma Sessions, and a Political Tug of War, 81 Fordham L Rev 2055 (2013);] see also Developments in the Law--Presidential Authority, 125 Harv. L. Rev. 2057, 2135--xxxx;

[115] See John H. Cushman, Jr., Senate Stops Consumer Nominee, N.Y. Times, Dec. 8 2011 (quoting Senator Hatch, a Republican, saying "This is not about the nominee, who appears to be a decent person, and may very well be qualified.")

nominees.[116] (That is, to the extent that there was a positive practice of up or down votes, that practice may have normative, not merely positive, weight, for legislative interpretation of how to implement constitutional powers.) It might be thought that voting - - affirmatively manifesting whether or not the Senate consents – is a part of the active responsibility of members of the Senate, to make a government that works. But is there a further obligation to vote in favor of the President's nominee, if members have no objections to the character, temperament or competence of the nominee for the position?

If the only responsibility of an elected representative were to act so as to facilitate government, the answer would arguably be yes. Government cannot function well, and the rule of law aspects of government are confounded, if the legislature creates bodies which then cannot act because they do not have appropriate heads or staffing. Likewise, from the point of view of a sense of accountability to the institution of Congress itself: If a prior Congress has enacted a statutory scheme, even if one disagrees with it, it might be argued that both the responsibility to promote a working government and a sense of responsible continuity with past Congresses would favor a yes vote, on behalf of a well qualified nominee, even if the nominee is to head an agency of which the representative disapproves.[117]

But we must complicate things further. Imagine the representative not only believes the agency is a bad idea (either because of views on the specific issue or because government has generally grown too large), but also believes (correctly let's assume) that the majority of her or his home-state constituents also believe the agency is a bad idea. The Senator cares about their views not only because he is their representative but because he hopes, in the next election, to be returned to office. This electoral connection is one that, by constitutional design, can be understood to tell elected representatives that they should place considerable weight, much of the time, on what their constituents would favor.

It does not, of course, address whether the representative should simply accept their views as a given or seek to influence or change them. What if the Senator believes the agency is a bad idea, but also believes it is a bad idea to legislate and not fill positions; that it would be better to try to repeal the legislation than to obstruct its fulfillment while it remains law on the books? What if the Senator, considering his or her obligations to all of the people in her home state, or to the people as a whole, recognizes the normative force of a prior decision to establish this agency as that which is desired by a majority? Should the Senator consider activating an opinion-influencing role, to try to persuade his or her constituents of the need to accommodate both the act of a prior

[116] See David E. Pozen, *Self-Help and the Separation of Powers*, 124 Yale L. J. 2, 76 (2014) (describing earlier convention that all nominees recommended out of Committee received a floor vote). Although unwritten conventions, not enforceable by courts, are more widely associated with British constitutionalism, a number of writers have argued that they can be identified and contribute importantly to constitutional government in the United States, See, e.g., id at at 38-39

[117] Cf. Andre Marmor, *Should We Value Legislative Integrity,* in LEAST EXAMINED BRANCH 125, 137-38 (respect for legal continuity and for pluralism disfavor attempts to "wipe the previous legislative slate clean")

majority to legislate the agency (by allowing it to be headed and to function as intended) while working to repeal or modify the legislation?

These questions largely concern the multiple constituencies that one could imagine accountability towards, and the possible existence of duties affirmatively to act as a representative (including, in the different case of so-called secret "holds," the duty to provide information to constituents). They do not answer the question of what the legislator should do, but they sketch some of the normative questions a good legislator might consider in arriving at an answer.

Imagine again that you are a Senator opposed to the current statute for the agency, and believe your constituents are likewise opposed, and you believe, for good reason. On the question of whether there is an obligation to compromise, is it a legitimate form of activity to threaten to withhold confirmation of worthy heads of federal agencies unless changes in the statute are made? They are not unrelated activities. And while the norm of enabling government to work favors having an agency have a head, the norm of compromise and the obligations owed to one's constituents may provide legitimate support to the refusal to confirm in order to elicit compromise from others on the future of the agency.

More blanket refusals to confirm, or, arguably, patterns of using confirmation as a bargaining chip on behalf of a minority view against decisions taken by a legitimate prior majority, raise, I think, somewhat distinct questions. At some point acts that, taken alone seem well within the range of legitimate reconciliation of the various forms of duties and responsibilities of representatives may become the kinds of obstruction, or denials of the legitimacy of the general norm of lawmaking and law execution by elected majorities and by the President, to run afoul of the first duty discussed – the duty to act so as to enable government to proceed. Moreover, at some point, repeated efforts or patterns have the potential to become a way of delegitimating the results of elections themselves – with consequences too vividly illustrated in too many other countries to require detailing.[118] That the question is a matter of degree does not remove it from the realm of constitutional judgment.[119]

Let's turn to another example, drawn from the debt ceiling crisis of the summer of 2011.[120] As described in footnote below, Congress threatened not to raise the debt ceiling in the summer of 2011 in order to allow Treasury borrowing to fund decisions already

[118] That multiple uses of formal legal powers can move systems in anti-constitutionalist directions has been noted in a different context, in which formally legal procedures are used to move systems away from democracy and towards more authoritarian status. See David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L Rev 189 (2013).

[119] Cf., e.g., Pozen, *Self-Help*, supra note __ at ___ (arguing for norm of proportionality in evaluating the appropriateness of measures of constitutional self-help); *Developments--Presidential Authority*, *supra* note __ at [2061] (" Sometimes, the line dividing legitimate use of presidential authority from abuse of power is only a matter of degree.").

[120] See Richard Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 808 (2014) (treating near default as example of decline of government in the United States)

made by Congress in authorizing federal spending and making appropriations, and despite predictions of adverse effects for the U.S. bond market.[121] The apparent aim of the threat, largely made by Tea Party Republicans, was to require spending cuts that equaled increases in the debt ceiling. The President and most Democrats opposed this proposal, believing that if the budget deficit were to be trimmed, both taxes and spending should be considered.

Interestingly, the most lively debate among legal scholars that this crisis generated initially seemed to focus on what the President should do, rather than on what members of Congress should do.[122] But if, as some scholars argued, the President was faced only with unconstitutional alternatives, would this not imply that Congress – the lawmaking body that had the authority to raise the debt ceiling, or modify the budget – had some duty itself to take action that would respond to these potentially unconstitutional situations? And if different members of Congress had different views on constitutionality, would the obligation to compromise not come importantly into play?

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[121] As Dorf and Buchanan describe it:: "In the spring of 2011, federal officials observed that at some point later in the year, the federal government would be unable to meet all of its obligations unless the federal debt ceiling were raised. That was not an economic problem. Interest rates on United States Treasury Bills were close to zero percent, and the government could readily issue new debt to cover its expenses, if only Congress would go through the formal process of raising the debt ceiling to conform with the budget that it itself had then only recently approved. There was a political problem, however. Expressing concern about long-term fiscal deficits, Republicans in Congress—especially those allied with the Tea Party movement—insisted on a dollar of current spending cuts for every dollar increase in the debt ceiling. Even as Keynesian economists warned of the dangers of premature austerity, Democrats, including President Barack Obama, accepted the Republican view that deficit reduction was imperative, but they insisted that increased tax revenues had to be part of the formula for achieving that goal. A standoff ensued. . . . [A]t the eleventh hour Congress did indeed pass legislation raising the debt ceiling and punting to a newly created bi-partisan congressional "supercommittee" the question of how to achieve the deficit reduction that was also mandated by the legislation. With the super-committee now having failed to send a legislative proposal to Congress for consideration, automatic spending cuts will occur, unless Congress enacts superseding legislation." Neil H. Buchanan and Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President)and others) from the Debt Ceiling Standoff*, 112 Colum. L. Rev. 1175, 1177 (2012). On July 14, 2011, Standard and Poor's warned that it might and, in August 2011, it did act to downgrade quality of U.S. Treasury bonds, largely because of apparent lack of political will to manage the budget in a responsible way (and even though the immediate debt ceiling crisis had been resolved). See Zachary A . Goldfarb, *S&P Downgrades U.S. Credit Rating for the First Time*, Washington Post, Aug. 6, 2011, http://www.washingtonpost.com/business/economy/sandp-considering-first-downgrade-of-us-credit-rating/2011/08/05/gIQAqKeIxI_story.html.

[122] See, e.g., Neil H. Buchanan and Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 Columbia Law Review 1176 (2012); on the blogs, see Ronald Dworkin, *Can Obama Extend the Debt Ceiling on His Own?*, N.Y. Rev. Books (July 29, 2011, 11:58 am), http**://** www.nybooks.com/blogs/nyrblog/2011/jul/29/can-obama-extend-debt-ceiling-his-own/ (arguing that the President has authority to ignore the debt ceiling basdd on the fourteenth Amendment "validity of the public debt" clause); Eric A. Posner & Adrian Vermeule, *Op-Ed., Obama Should Raise the Debt Ceiling on His Own*, N.Y. Times (July 22, 2011), http:// www.nytimes.com/2011/07/22/opinion/22posner.html?r=0 (arguing for presidential authority to act for "the necessities of state"); Larry Tribe, *A Ceiling We Can't Wish Away*, N. Y. Times, July 7, 2011 at http://www.nytimes.com/2011/07/08/opinion/08tribe.html?_r=0. To be sure, a later article by Buchanan and Dorf was addressed to both the President and the Congress, see Neil Buchanan and Michael Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating over Spending and Tax Laws, Congress and the President Should Consider the Debt Ceiling a Dead Letter*, *Columbia Law Review*, 113 Colum L. Rev. 13 (2013), as were other legal comments. [get cites]

In addition to factors discussed in connection with the first example (withholding confirmation), there are other potentially relevant factors here. First, the issues raised by the 2011 debt crisis had clearer implications for foreign affairs; damage done might thus be less within the control of domestic institutions to repair. Second, much graver harm to the domestic economy was potentially at stake. Third, the situation arguably posed a more serious rule of law problem, as evidenced by the development of constitutional theories and proposals that substantially 'pushed the envelope' of accepted understandings. These three factors – together with the availability of other means in the near future to take steps to redress budget deficits – for those who believed they were harmful to the economy -- made the costs of playing "chicken" much higher in this case than in the first, and, arguably, increased the importance of compromise to avoid such harms.

Still another example of a failure of pro-constitutional representation, which arose after this paper was first presented, was the sixteen-day government shutdown in October 2013. Described in scholarship as a "distinctively American version of political failure,"[123] this sixteen day period saw the suspension of all "nonessential services" - - including environmental monitoring, work on a backlog of veterans disability claims, and the closure of services for over 6,000 preschool children.[124] The shutdown resulted from efforts by the Republican majority in the House of Representatives to prevent implementation of the Affordable Care Act of 2010, by "condition[ing] support for continuing resolutions [to fund the government] on the delaying or defunding the Affordable Care Act."[125] The costs of the shutdown to the government (and taxpayers) were estimated at between two and six billion dollars.[126] As Professor Young observes, the Republican Party is "more tolerant of shutdowns," and thus has a "bargaining advantage."[127] But shutting down the government is the antithesis of what any elected representative - whether in favor of smaller government or larger government - should want; such shutdowns sweep indiscriminately, and result in the disruption of programs that had been authorized by law. Use of budget shutdowns to bargain for changes in recently enacted legislation has a high risk of inviting retaliatory responses; their increasing and increasingly routine use is hard to reconcile with a basic commitment to the public good and a working government.[128]

Examples of concern arise not only at the national level but in state legislatures as well. Consider the decision of the Democratic members of the Wisconsin State Senate to literally leave the State of Wisconsin in early 2011, to prevent a quorum from existing in

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[123] Katherine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2014 Lapse in Appropriations*, 94 B. U. L. Rev. 991, 991 ((2014).
[124] Id. at 993-94.
[125] Id. at 996.
[126] Id. at 997.
[127] Id. at 1001.
[128] On the relationship between the debt ceiling crisis and the later government shutdown, see Neil Buchanan and Michael Dorf, *Bargaining In The Shadow Of The Debt Ceiling: When Negotiating Over Spending And Tax Laws, Congress And The President Should Consider The Debt Ceiling A Dead Letter*, 113 Colum. L. Rev. Sidebar 32 (2013).

the Senate so as to try to prevent the Republican governor and legislative majority party from enacting a budget and anti-union measures with which they disagreed.[129] The legality of their move is debatable.[130] Even if lawful, a decision by elected legislators to absent themselves, if exercised frequently, could undermine the possibility of democratic self-government altogether.[131]

Vicki Jackson 8/10/15 7:24 PM
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Finally, consider legislative spending projects that are often referred to disparagingly as "pork", as in "pork barrel politics." An example might be the funding for the so-called "bridge to nowhere" promoted by public officials from Alaska.[132] Although such projects are often criticized as wasteful, and not in the public interest, it is hard to imagine that an elected representative would seek such funding if it were not in the interests of some of the representative's constituents. Those "public interests" of particular constituencies might well be served by the spending; when "pork barrel" accusations are made, it is often the case that there is *some* public-spirited reason for the spending from the viewpoint of particular constituents.[133] "Pork barrel" politics claims

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[129] For news accounts, see Amy Merrick and Kris Maher, Wisconsin Governor Seeks Deep Cuts, Wall Street Journal, March 2, 2011 (noting that on February 17, 2011 Democratic legislators had left the state and not yet returned); Bill Glauber, "Democrats flee state to avoid vote on budget bill," Milwaukee Journal Sentinel, http://www.jsonline.com/news/statepolitics/116381289.html; Lila Shapiro, "Wisconsin Protests: State Police Pursue Democratic Lawmakers Boycotting Vote," Huffington Post, Feb 17 2011, updated May 25, 2011.

[130] The Wisconsin Constitution authorizes each house to provide for the compulsory attendance of its members. *See* W.I. Const, art. IV, § 7. The 2011 Wisconsin Senate Rules stated that "[m]embers of the senate may not be absent from the daily session during the entire day without first obtaining a leave of absence," granted by majority vote and that the body can "compel the attendance of absent members." Senate Rules 15, 16, adopted as part of 2011 Senate Resolution 2, adopted January 3, 2011, available at http://docs.legis.wisconsin.gov/2011/related/rules/senate/. Permission to be absent was not given to the Democratic legislators. During the impasse, Senate Republicans held the Democrats in contempt, but the legality of this decision was questioned at the time. *See* Mary Spicuzza and Dee J. Hall, "Senate Orders arrest of missing Democrats," Wisconsin State Journal, March 4, 2011, http://host.madison.com/wsj/news/local/govt-and-politics/senate-orders-arrest-of-missing-democrats/article_8d9ad090-45bd-11e0-bf68-001cc4c03286.html.The walk-out was ultimately resolved by the Governor's re-submission of a bill concerning collective bargaining, removing certain fiscal measures, which enabled Republicans to pass it under rules not requiring a special majority and thus without the presence of the Democrats in the Senate. See Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABAJ. Lab. & Emp. L. 293, 299 (2012). The law thereby enacted was held invalid by a state trial court, whose judgment was then reversed by a four to three vote in the Wisconsin Supreme court (in an event linked to an alleged physical assault by one justice on another). Voters who disagreed with the new law then procured a recall election, which resulted in a two-seat gain for the Democrats - not enough to secure repeal of the law. Id. at __.

[131] See supra note [60].

[132] A proposed Gravina Island Bridge would have linked Gravina Island, with its roughly 50 residents and the Ketchikan airport, to Ketchikan, a town of about 8,000 on the Alaskan mainland, replacing an existing ferry service; the cost for the bridge at one time was reflected in a $398 million earmark. See generally Daneille Schlanger, *Bridge to Nowhere Finally Scrapped in Favor of Ferries*, Huffington Post, Aug 8,2013, http://www.huffingtonpost.com/news/gravina-island-bridge/ [Carl Hulse, *Two Bridges to Nowhere Tumble Down in Congress*, N.YT Times (Nov. 17, 2005; Alaska; End Sought for Bridge to Nowhere, NY Times, 9/22/2007; Yereth Rosen, *Palin Bridge to Nowhere Angers Many Alaskans*, Reuters, 1/08]; Ronald Utt, *Bridge to Nowhere: A National Embarrassment*, http://www.heritage.org/research/reports/2005/10/the-bridge-to-nowhere-a-national-embarrassment

[133] This is not to deny that some "pork" may funnel resources to those already highly advantaged or to projects that are detrimental to any reasonable understanding of a general public interest even within the

often involve assessment of comparative benefit, of where is there greater need for distribution of federal funds. This puts into tension the accountability to electoral constituents vs. accountability to national constituency, in settings where deferring to local constituents will often be more attractive and, arguably, in the long run more democracy serving. Because sometimes "pork barrel" or "log-rolling" exchanges may facilitate negotiations that allow projects to go forward that plainly benefit the national public interest, including such "side payments"[134] in an overall legislative package might perhaps be understood as an important way in which democratic legislatures are able actually to "act."

III. Pay Offs for Legal Education?

I want to conclude by arguing that law schools and legal scholars should begin to rectify the relative lack of attention to good representation. I recognize that even if one thinks it would be good for people, generally, to be exposed to a broader range of thinking about what it means to be a good representative, a question may arise whether this really should have a significant role in a law school curriculum. It might be thought that the idea of good representation falls within the domain of "politics," which should be studied in political science departments or by political theorists or political philosophers. (Or in general civics classes.) In the day-to-day work for which we train lawyers, it might be argued, these questions are of little practical relevance.

Here are six possible reasons why it does matter that law schools do more in exposing students to complex normative discourses about representation. I am not sure each is persuasive; and I suspect there are others. But here is a start.

First, trying to specify what it means to be a "pro-constitutional " elected representatives might shed interesting light on the different character of legislative bodies, and their members, in differently structured constitutional systems. That is, being a "pro-constitutional" representative in the U.S. federal system at the national level may be quite different, or involve a different balance of "representational" roles and considerations, than being a "pro-constitutional" representative in a proportional representation (PR) system (or in a unicameral legislature). The role of representatives in a PR system, for example, might be thought to include larger elements of accountability to the political party on whose list the representative ran. And, of course, in the absence of an individual constituency – as is typical in PR systems – no distinction would in

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constituency. See, e.g., Hardin, *supra* note__, at 37 (criticizing the compromise on funding to protect against domestic terrorism that allocated more than seven times as much, per capita, to Wyoming as to New York).

[134] On the positive role of "side payments" in public deliberative negotiations, see Warren & Mansbridge, supra, at __. ("[T]he question as to whether trading is on balance good or bad often depends on the kinds of items and the kinds of trades.") The authors locate the problem of pork and log-rolling in the literature on the benefits of expanding the subjects of negotiation to enhance the ability to reach agreement. See also Jonathan Cohn, *Roll Out the Barrel: The Case Against the Case Against Pork*, in THE ENDURING DEBATE: CLASSIC AND CONTEMPORARY READINGS IN AMERICAN POLITICS 141 (David. T. Canon et al eds. 2d ed 2000). But see Sean Paige, *Rolling out the Pork Barrel*, in THE ENDURING DEBATE, at 138

theory exist between the interests of a particular geographic constituencies and the interests of the country as a whole (though geographic concentrations of particular party members may produce a similar effect).

Moreover, if differences in representation roles are associated with different kinds of elected legislative representatives, it might have implications, for example, for intentionalist theories of legislative interpretation: in parliamentary systems with national lists, one could imagine arguments directing more focus on political party agendas and less on statements of individual members in parliamentary systems. And in a bicameral (rather than unicameral) legislative body, if one house has longer terms, that fact might imply a greater responsibility for independent deliberation. [135]

Further, in a parliamentary system with the ready possibility of new elections if the government in power loses the people's confidence, the "pro-constitutional" role of members of the majority might be thought to weigh more heavily in favor of what acting in accord with what their constituents want or will accept in the near term, than would be the case, for example, for members of the Senate in the United States, who serve fixed six year terms designed to promote the ability to take a somewhat longer, more generally public spirited view. And the role of being a "pro-constitutional" minority member may be more importantly shaped --throughout the term in office -- by an understanding that members of the minority party must be prepared in the event that they need to take over actual governance; in a presidential system like the United States, terms of elected officials at the national level are fixed.

A related set of questions might explore links between degrees of political competitiveness and the responsibilities of representatives. Although there is some disagreement on this point, the weight of recent scholarship suggests a decline in the degree of competitiveness within districts.[136] In a more competitive district, representatives may feel more of an obligation to be responsive to constituents; in a less competitive districts, representatives may feel more freedom to act independently or to seek to influence constituencies to her views. Although there is some suggestion that even incumbents in "safe" districts do not feel safe, beyond this empirical question is the normative question of how the presence or absence of highly competitive districts affects the obligations of representatives which, in turn, raises further empirical and normative questions about the overall functioning of the legislative body.

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[135] Differences between membership in the House and the Senate, within the U.S. Congress, have been often-remarked upon. See, e.g., Tara Leigh Grove and Neil Devins, *Congress's (Limited) Power to Represent Itself in Court,* 99 Cornell L Rev, 571, 604-22 (2014). Do the lengthier terms in the senate suggest that more attention to the national perspective should be expected there, given the Senators greater independence from immediate electoral pressures, from a "pro-constitutional" Senator?

[136] See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv L Rev 593, 623-30 (2002); Drew Desilver. *For Most Voters Congressional Elections Offer Little Drama* (Pew Research Center, November 3, 2014), http://www.pewresearch.org/fact-tank/2014/11/03/for-most-voters-congressional-elections-offer-little-drama; but cf. Nathan Persily, et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. Rev. 1299, 1327 (2002); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002).

Second, an enduringly important question in constitutional interpretive theory is the relevance of the position of other branches in evaluating the constitutionality of their action. Whether this inquiry is framed in term of "deference," or degree of certainty of constitutional error, or John Hart Ely's theory of "representation reinforcement," development and defense of these theories might be thought to call for an appreciation of both the normative aspirations of a representative government and its actual operations. For example, on Ely's approach (very bluntly stated), courts should intervene most aggressively when the processes of representative democracy are blocked. Although this has traditionally been understood in terms of the exclusion of minorities from participation, it could be extended or understood in deeper or broader ways if we had a richer understanding of the normative aspirations for what a good representative does in a constitutional democracy.[137] Moreover, as Dick Fallon has argued, what constitutional theory of judicial review one adopts should be based in part on some prediction whether that theory will on the whole yield better results than others.[138] Evaluating the quality of representative institutions might thus be an aspect of choosing the right interpretive theory for a particular period.

It is, to be sure, possible that one could have a system that works reasonably well in producing democratic outcomes even if its component parts are unattractive.[139] One could say that as long as there are elections, or contested elections, there is no need for normative theories of what good representatives do; the check of being voted out of office suffices to achieve acceptable levels of democratic functioning. It is also possible to argue that constitutional interpretive theory might **not** vary depending on the quality of particular representatives in a legislative body but would instead depend on an evaluation of how a system of democratic deliberation and decisionmaking – including legislatures, media, civic society -- together work to produce legislation. Perhaps enough competing forces, all unattractively motivated and acting selfishly and without any normative aspirations other than maximizing their own self-interest, can produce a good enough and democratically legitimate set of laws.[140] Thus, it could be argued, that an understanding of representation as something undertaken by particular persons called "representatives" (as "judging" is an activity undertaken by particular persons called "judges") is simply not important for constitutional law – that what matters is some aggregate understanding of whether the legislature as a whole is representative or whether the overall system of which the legislature is a part meets some form of democratic criteria.

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[137] For proposals that judicial review should vary depending on whether legislation was the product of divided or unified government (reflecting both the greater risks of overreach and the fewer incentives for careful checking when a single party dominates all organs in the legislative process, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2312, 2312 (2006). For discussions of judicial review of the deliberative quality of legislative processes see David Landau, *Political Institutions and Judicial Role in Comparative Perspective*, 51 Harv. Int'l L. J. 319 (2010).

[138] Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Calif. L. Rev. 534 (1999).

[139] See Vermeule, *Foreword: System Effects*, *supr*a note __ at __ (discussing various combinations of offsetting "second bests").

[140] There are elements of this idea in some of Madison's writing; and may be connected to more modern "competitive" or "pluralist interest group" understandings of democracy.

But it seems unlikely that the kinds of "virtues," attitudes, or "good conduct" to which representatives aspire, or at least some representatives aspire,[141] would be irrelevant to how the legislative body worked as a part of that overall system. Although institutional and economic structures no doubt play strong roles in producing the kind of Congress and congressional process we have, the possibility of legislative 'statesmanship', motivated by a set of aspirations of what being a good representative in a constitutional democracy entails, should not be dismissed. Especially if one believes, generally, that representative should act on behalf of the narrow interest of their constituency, downward spirals of conduct that are not in the collective self-interest may occur. Whether one views the legislative process as best operating under pluralist interest group assumptions, deliberative democracy assumptions, or even critical structural reform assumptions,[142] representatives in any of these modes will sometimes need to compromise with others of very different views; they will need to be responsive to their constituencies and provide and receive information; they will be asked if they are in the Congress to provide help to their constituents; and they will face many choices about how to participate in a government that works.

Third, there may be some pay off for thinking about approaches to statutory interpretation. If, for example, one conceives of legislators' duties as no more than advancing the interests of their constituents, one might be more persuaded of the importance of treating legislation as reflecting presumptive compromises worthy of respect by the judiciary.[143]; on the other hand if one conceives of legislators' as having sometimes conflicting duties to their constituents' more private interests and to a conception of the public good that may transcend immediate understandings of the interests of the constituency, one might be more attracted to theories that seek to presume more public-regarding interpretations of ambiguous legislation.[144]

Fourth, paying more attention to what being a "good" representative means may heighten understanding of what being a good "judge" entails. Is the opposition between the need for legislators to "compromise' and the importance of "principle" in judging correct? Should judges sometimes compromise with other judges, e.g., on appellate courts, to promote a more unified statement of the law? Do judges have more obligation than legislators to act consistently? Or is the appeal of "equity" something that applies to both judges and legislators?[145]

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[141] Without some numbers of members with sufficiently pro-constitutional attitudes (if not natural to them, then produced by fear of falling short of constituents,' or media' or fellow legislators' expectations), a legislature might become simply a place of gridlock, or abuse. The numbers needed might be small.

[142] See generally WILLIAM N. ESKRIDGE, JR., ET AL, LEGISLATION AND STATUTORY INTERPRETATION 19-23 (2000).

[143] Cf. Manning, supra note __ (viewing the Constitution as a bundle of compromises).

[144] Cf. e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986) (arguing, on the assumption that legislators act in response to "private interest" groups to the detriment of the public interest, for approaches to statutory interpretation that transform private interest driven legislation into more public interested law).

[145] Cf. Federalist No. 78 (Hamilton) (about how judges will temper, through interpretation, the otherwise unjust application of laws); Macey, *supra* note [126] at 226 (arguing that the "judiciary inevitably checks legislative excess" in statutory interpretation); Aristotle, Nicomachean Ethics, in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1795-96 (David Ross trans., revised by J. Urmson, Jonathan Barnes ed., 1984) ("[A]ll

Fifth, law school graduates will themselves be elected to political office, including as representatives, in disproportionate number. Those of our students who will be judges have a rich and deep understanding of what core areas of agreement are about the normative expectation of judges; but much less so about the expectations of being a representative. The opportunity to consider, analyze, apply, critique, and reflect critically about different normative theories of the obligations of elected representatives – to their constituents who voted for them, to all their constituents, to their political party, to the collegial body of which they are a part, to a broader community of which their district may be a part, to a particular policy agenda about which the representative deeply cares – can only enhance their ability conscientiously to balance the multiple pulls to which they will be subjected in performing their office.

Sixth, and concomitantly, the undernourished normative view that we provide about political representation and elected representatives – especially to the extent it is based on rational actor models that focus on re-election or forms of personal rent-seeking – may in its own small way contribute affirmatively to the pathologies of American constitutional democracy.[146] Providing a more complex, realistic, and at the same time normatively aspirational view of political representation in scholarship, teaching and policy may in a small way contribute to a more healthy democratic politics.[147] In order to have representatives who behave in "pro-constitutional" ways, we need to provide richer

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law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error.... When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission - to say what the legislator himself would have said had he been present .... And this is the nature of the equitable … "), quoted in Heidi Hurd, *Justifiably Punishing the Justified*, 90 Mich. L. Rev. 2203, 2204 (1992).

[146] Although some attribute the ills of democracy to citizen apathy, scholars of democracy report that citizen participation is on the rise. What has changed more, perhaps, is the decline of moderation and nonpartisanship as an organizing ideal, see Pildes, *Romanticizing Democracy*, supra note __ at 823-24 (summarizing data from Robert Putnam and others), and the increased polarization of elected representatives in legislatures, see Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 Wm & Mary L. Rev. 414 (2004). See generally NOLAN MCCARTY, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006) (exploring simultaneous rise of income inequality and political polarization); BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2006) (exploring reasons for increased polarization and noting its advantage in creating clearer choice between political parties, as well as its disadvantages). For an argument that "spatial homogeneity" in the distribution of voters within ditricts may decrease polarization, see Nicholoas Stephanopoulos, *Spatial Diversity*, 125 Harv L Rev. 1903 (2012)). While polarization may increase the sense of choice that voters have in choosing among candidates and parties, in extreme forms it can be debilitating to the ability of decisionmakers to compromise and - in its most extreme forms - can threaten the protection of basic human rights.

[147] Cf. Richard Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 Mich. L. Rev. 936, 938-39 (1991) (arguing that some social goals require subjective attitudes that may, or may not, be produced through public programs, and urging attention to the "cultural" consequences of "contractualization" of, e.g., military service or pro bono legal work). But cf. Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273 (2011) (concluding that the causes of political hyperpolarization are historic and structural, and thus not likely to be changeable).

and thicker accounts of the normative obligations of elected representatives, accounts that go beyond assumptions that behavior in the legislatures is unconstrained by anything other than each representative's present self-interest in promoting his or her own reelection, power or wealth.[148] By not teaching, or developing in our scholarship, richer normative accounts of elected political representation, but implicitly offering "rational actor" accounts that assume little to no public spiritedness on the part of elected representatives, or little or no commitment to the possibility of reasoned decisionmaking, are law schools contributing to a broader constitutional culture in which the only hope for "good" decisions is believed to lie with the least democratic branch?

Conclusion:

Some may think it naïve to consider the possibility that having normative aspirations for being a good pro-constitutional" legislator may make some difference in behavior. I think it naïve to disregard the effects of ideology, world-view and self-understandings on behavior. A world-view that rests entirely on narrow definitions of immediate self-interest can lead, we know, to the loss of the common good. A world-view that rests entirely on principles will result in the failure of representative government in a diverse and heterogeneous polity; but a world view without principled aspirations to serve the common goodmay also have this result.[149] My hope is to encourage other constitutional lawyers, whether they accept or reject any particular arguments in this paper, to engage in a project central to the success of constitutional democracy -- the normative reconstruction of representation.

[148] Compare the debate over the filibuster and whether, when Democrats controlled the Sente, the should vote to change the filibuster rule by simple majority. [cite] Some Democrats, it was reported, were concerned about the implications of such a move for a time when their party may be in the minority. [cite] Even if this concern were entirely self- interested, it illustrates the distinction suggested between "present" self-interest and a longer run perspective. When thinking about the longer run, it might be argued, decisionmakers may become somewhat more public-spirited because their own future circumstances are less certain. [Cf Adrian Vermeule, Mechanisms of Democracy (2007) (discussing how putting off decisions to the future can function as a veil of ignorance rules and generally discussing small scale institutional design).]

[149] If Machiavelli's *The Prince* inverted the virtuous tradition of the "mirrors for princes" literatures [add cite to explanatory literature], with his effort to develop a special political ethics focused on effective maintenance of power in the governance of mostly nonvirtuous human beings, perhaps it is now timely for a corrective to Machiavelli's cynicism. With thanks to Clark Lombardy for bringing the "mirrors for princes" literature to my attention.